

Conflicts Between the Commander in Chief
and Congress: Concurrent Power Over the
Conduct of War

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Abstract

The Bush Administration argues that the Commander in Chief has exclusive power to decide what military tactics to use to defeat a wartime enemy. The Administration's constitutional position that Congress may not permissibly interfere with these Executive Commander in Chief powers has been heavily criticized, particularly with respect to the Executive power to interrogate prisoners or engage in warrantless wiretapping on American citizens and its argument that Congress cannot limit the Iraq war. Yet, many critics concur in the Administration's starting point—that the President has exclusive authority over battlefield operations.

This article challenges that assumption. It argues that Congress and the President have concurrent power to conduct warfare that has been authorized by Congress, with Congress maintaining the ultimate authority to decide the methods, strategies and tactics by which the United States will wage war, if it chooses to exercise that authority. The President can direct and manage military campaigns in the absence of congressional regulation and restrictions, but the only Commander in Chief power that Congress cannot override is the President's power to command, to be, in Alexander Hamilton's words, the nation's "first general and Admiral." The understanding of concurrent power set forth in this article argues that the two branches power over the conduct of authorized warfare is divided as a practical matter by timing, not subject matter, with the President having the power of initiative over the theatre of war, and Congress having a more deliberative, reflective power, allowing it to check and limit Executive initiative both before and after the Executive acts.

Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*

The Bush Administration has articulated sweeping constitutional theories regarding the President's power as Commander in Chief to conduct its war against terror. Notwithstanding the express constitutional grant of authority to Congress "to declare war," "grant letters of Marque and Reprisal," make rules concerning captures on land and water," "raise and support armies," "to provide and maintain a navy to make rules for government and regulation of the land and naval forces" and other express powers such as the necessary and proper clause, the Administration argues that the Commander in Chief has exclusive power to decide what military tactics to use to defeat a wartime enemy. Administration officials have contended that "[C]ongress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."¹ The

*Copyright © 2007 by Jules Lobel. Professor of Law, University of Pittsburgh Law School. I want to thank my colleagues at the Law School for their thoughtful comments on this article at a University of Pittsburgh Law School colloquium. I particularly want to thank Rhonda Wasserman, David Adler, Bill Luneburg, Ruth Colker and George Loewenstein for their helpful comments. The University of Pittsburgh Law School Document Technology Center was incredibly helpful in their preparation of this article. Finally, I want to especially thank Law Librarians Linda Tashbook and Marc Silverman, my research assistants Lisl Brunner, Lauren Miller and Christopher Strayer for their research on this article, and my wife, Karen Engro, for all her support while I was writing it.

¹Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A 35 (Aug. 1, 2002), *available at* <http://www.texscience.org/reform/torture/bybee-olc-torture-1aug02.pdf>. The Justice Department subsequently withdrew that claim as "unnecessary" but never repudiated it, Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A 2 (Dec. 30, 2004), *available at* <http://www.usdoj.gov/olc/18usc23402340a2.htm>, and a 2005 presidential signing statement stated that the Executive branch would interpret the McCain Amendment's prohibition on cruel and inhumane interrogations of detainees "in a manner consistent with the constitutional authority of the

Administration has also claimed that Congress was without constitutional authority to prohibit the NSA's warrantless wiretapping program because it is an important intelligence gathering tactic in the government's war against terrorism.² The clearest and most sweeping statement of the President's authority came from the Department of Defense's Working Group Report on Detainee Interrogation in 2003, which stated that "in wartime it is for the President *alone* to decide what methods to use to best prevail against the enemy."³

Most recently, President Bush has asserted that Congress does not have the power to limit or wind down the Iraq war, stating, "I don't think Congress ought to be running the war."⁴ Indeed, President Bush's May 1, 2007 veto message of the 2007 Iraq supplemental appropriations bill, which would have required that the President begin withdrawing troops by July 1 under certain circumstances, stated that, "This legislation is unconstitutional because it purports to direct the conduct of the operations of the war in a way that infringes upon the powers

President . . . as Commander in Chief" President's Statement on H.R. 2863, The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005). As a senior Administration official later explained, the signing statement was intended to reserve the President's constitutional right to use harsh interrogation methods "in special situations involving national security" despite the congressional ban. Charlie Savage, *Bush could bypass new torture ban*, THE BOSTON GLOBE, Jan. 4, 2006, at A1.

²U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 3 (Jan. 19, 2006), *reprinted in* 81 IND. L.J. 1374, 1376 (2006), *also available at* <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

³U.S. Department of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations 24 (Apr. 4, 2003), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>.

⁴Adam Cohen, *Just What the Founders Feared: An Imperial President Goes to War*, N.Y. TIMES, July 23, 2007, at A22.

invested in the presidency by the Constitution including as Commander in Chief of the armed forces.”⁵

The Administration’s position that Congress may not permissibly interfere with these Commander in Chief powers has been heavily criticized, particularly with respect to the Executive’s asserted expansive authority to interrogate prisoners,⁶ engage in warrantless wiretapping of American citizens, or conduct the Iraq war.⁷ Yet, most critics concur in the Administration’s starting point—that the President has exclusive authority over battlefield operations.⁸

⁵H. Doc. No. 110-31 (Veto Message from the President) at CONG. REC. H4315. Stuart Taylor, *The President’s War Powers*, NEWSWEEK, May 7, 2007, <http://www.msnbc.msn.com/id/18537443/site/newsweek/>.

⁶See DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 62-63 (2007); Fletcher N. Baldwin, Jr. & Robert B. Shaw, *Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program: Exit the Rule of Law*, 17 J. LAW & PUB. POL’Y 429, 466-68 (2006); Erwin Chemerinsky, *The Assault on the Constitution*, 40 U.C. DAVIS L. REV. 1, 12 (2006). Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2005). S. Amend. 1977, 109th Cong., adopted by 90-9 vote in Record Vote No. 249. See also CONG. REC. S11-070-072 (Leahy, McCain Constitutionality discussion).

⁷Curtis Bradley, David Cole, Walter Dellinger, Ronald Dworkin et al., *On NSA Spying: A Letter to Congress*, NEW YORK REV. OF BOOKS, Feb. 9, 2006 at 42, <http://www.nybooks.com/articles/18650>. Letter from David Barron, Harvard Law School Professor et al. to Harry Reid, Senate Majority Leader et al. (Jan. 17, 2007) (asserting that Congress does have the power to give legal effect to its will with respect to U.S troop levels in Iraq), available at http://www.law.duke.edu/features/pdf/congress_power_letter.pdf; *Exercising Congress’s Constitutional Power to End a War: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007).

⁸Saikrishna Prakash, *Regulating the Commander in Chief*, 81 IND. L.J. 1319, 1322, 1323 (2005) (noting that critics of the Bybee memo admit that the President has some exclusive authority over battlefield tactics); Michael Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1242 n.116 (2005) (claiming that the President has exclusive authority over “tactical commands tailored to particular battles or campaigns”); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 171-72 n.395 (2004) (criticizing the Administration but acknowledging that “Congress lacks the power—in the

This article challenges that assumption. It argues that Congress and the President have concurrent power to conduct warfare that has been authorized by Congress, with Congress maintaining the ultimate authority to decide the methods by which the United States will wage war, if it chooses to exercise that authority. The President can direct and manage warfare in the absence of congressional regulation and restrictions, but the only Commander in Chief power that Congress cannot override is the President's power to command, to be, in Alexander Hamilton's words, the nation's "first general and Admiral."⁹

The Administration's position that it has exclusive power over battlefield operations finds some support in both the academic literature and in dicta in the concurring opinion of Chief Justice Salmon Chase in *Ex parte Milligan* in 1866, which stated that "Congress cannot direct the conduct of campaigns. That power and duty belongs to the President as Commander-in-Chief."¹⁰ So too, Justice Robert Jackson's concurring opinion in *Youngstown* contains dicta that seems to support exclusive presidential power over battlefield operations: "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."¹¹ In addition extrajudicial statements by Supreme Court Justices support exclusive

absence of international legal rules—to regulate the President's conduct of battlefield operations in wartime . . .").

⁹THE FEDERALIST NO. 69, at 448 (Alexander Hamilton, James Madison & John Jay) (Modern Library 1937).

¹⁰*Ex parte Milligan*, 71 U.S. 2, 139-40 (1866).

¹¹*Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

Executive power over the movement of troops and direction of campaigns.¹² Despite these statements, the Supreme Court has never invalidated congressional legislation as interfering with the President's Commander in Chief power to conduct military operations.¹³

The seeming agreement between the Administration and many of its critics that the President has unchecked power to conduct battlefield operations raises difficult questions. For there is a certain logic to the Administration's argument, once one accepts the initial premise. The argument starts with the proposition that Congress could not statutorily command the President to shift the 101st Airborne division from Baghdad to Anbar province, nor could Congress have directed FDR to launch D-Day at Brittany, not Normandy, or to initiate an invasion of France in 1943 instead of attacking Italy. So far, everyone appears to agree. But then, the Administration argues, what if commanders believe that a prisoner captured on the battlefield possesses information critical to the success of the battle. Isn't the issue of how, when, and where you interrogate him or her just as much as a tactical military decision as the decision about where troops should be placed and how campaigns should be conducted? So too,

¹²William Howard Taft wrote in 1915 that the President's Commander in Chief power made it "perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another." William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916). In 1917, Charles Evans Hughes claimed that while Congress had unlimited power to create an army, "it is for the President as Commander in Chief to direct the campaigns of that army wherever he may think they should be carried on . . . congressional power to enact legislation necessary to prosecute the war must be exercised without impairment of the authority committed to the President as Commander in Chief to direct military operations." CHARLES EVANS HUGHES, WAR POWERS UNDER THE CONSTITUTION, S. Doc. No. 65-105, at 7 (1st Sess. 1917).

¹³U.S. CONST. art. I, § 8, cl. 11, 14. David Baron, Testimony Before the United States Senate, Committee on the Judiciary on "Exercising Congress's Constitutional Power to End a War," Jan. 30, 2007, *available at* http://judiciary.senate.gov/testimony.cfm?id=2504&wit_id=6037.

argues the Administration, decisions about how and where to place spies to obtain information about enemy plans clearly seems a part of the President's power to conduct military campaigns, and therefore Congress cannot interfere with the President's wartime decisions to engage in electronic surveillance against the enemy by requiring him to obtain a warrant before authorizing such surveillance. Similarly, if Congress could not limit the D-Day invasion force to a certain set number of soldiers (for presumably that would interfere with the military campaign), how could Congress disapprove the President's surge strategy in Iraq. Once one accepts the Administration's starting proposition—which most commentators appear to accept—the logical possibilities for extension seem almost limitless.¹⁴ Yet, as this article will demonstrate, that starting proposition is erroneous.

But where to draw the line? As Justice Jackson noted in *Youngstown Sheet & Tube v. Sawyer* “[T]hese cryptic words [commander in chief] have given rise to some of the most persistent controversies in our constitutional history.”¹⁵ For Congress has a host of war powers conveniently ignored in the Administration's argument. Arrayed against the President's sole war

¹⁴In *Youngstown Sheet & Tube*, Justice Jackson wrote of the necessity yet difficulty of limiting the President's Commander in Chief powers:

just what authority goes with the name has plagued Presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under Presidential command. Hence, the loose appellation is sometimes advanced as support for any Presidential action, internal or external, involving the use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

343 U.S. 579, 641-42 (1952) (Jackson, J., concurring).

¹⁵*Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J. concurring).

power as Commander in Chief are congressional powers to declare war, issue letters of marque and reprisal, to raise armies and navies, to make rules concerning captures on land and water, and to make rules for the regulation of the army and navy.¹⁶ Congressional authority to define offenses against the law of nations, its power to appropriate funds and its power to make all laws which shall be necessary and proper for carrying into execution its powers also constitute important wartime powers.¹⁷ Congressional power over warfare also seems logically limitless, and the Constitution's text seems to provide Congress with substantial power to check virtually all the President's Commander in Chief powers. Indeed, Chief Justice Marshall once referred to the "whole powers of war" being vested in Congress.¹⁸

Despite the widespread debate and criticism, the Administration's underlying theory of the relationship between the President's Commander in Chief power and Congress's war powers has not been examined.¹⁹ As one Administration critic recognizes, "for the past eighty years, no scholar has undertaken an in-depth analysis of the proper line of demarcation between the commander-in-chief's exclusive power over battlefield operations and the areas where Congress and the President share concurrent authority."²⁰

¹⁶U.S. CONST. art. I, § 8, cl. 10, 12, 13.

¹⁷*Id.*

¹⁸*Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1800).

¹⁹Prakash, *supra* note 8, at 1319, 1323; Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 825 (2006) (agreeing with Prakash that an "exhaustive analysis" of the Commander in Chief power "has not yet appeared in print in any book or article of which either of us is aware").

²⁰Jinks & Sloss, *supra* note 8. The one scholar Jinks and Sloss mention is Clarence A. Berdahl, whose book, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES*, first published in 1920, takes a sweeping view of the Commander in Chief power that might support at least some of the Administration's claims. *See also* Prakash, *supra* note 8, at 1323 (claiming that "far

An important reason that scholars have not extensively analyzed the allocation of authority between the President and Congress over the conduct of warfare is that the focus of scholarly and political debate for the last half of the twentieth century has been on the President's power as Commander in Chief to initiate warfare. Modern presidents asserted a power to initiate warfare without congressional authorization, sparking a lively debate among scholars, political leaders and the public as to the extent of the President's Commander in Chief power versus Congress's authority to declare war.²¹ The passage of the War Powers Resolution of 1973 over President Nixon's veto did not quell the dispute between Congress and the President as to the extent of independent Executive authority to initiate warfare.²² This debate, which has continued to this day, has until now largely subsumed and submerged the important related, yet independent question of the scope of the President's Commander in Chief power to conduct a war that Congress *has* duly authorized.

too many" have avoided undertaking the historical research necessary to determine the proper boundaries of the President's Commander in Chief power); *see also* Ramsey, *supra* note 8 (arguing that some line must be drawn between permissible and impermissible congressional military regulations, tentatively is suggesting such a line, but noting that the author has not made a detailed study of the matter). The one work that Jinks and Sloss appear to have overlooked is Francis Wormuth and Edwin Firmage's *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986), which does devote a chapter to the Commander in Chief clause. *See also* LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004); David Gray Adler, *The Law: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism*, 36 PRES. STUDIES Q. 525 (2006).

²¹For representative samples of the scores of articles and books on this subject, see JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993); David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 POL. SCI. Q. 1 (1988); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); Rostow, *Great Cases Make Bad Law*, 50 TEX. L. REV. 833 (1971).

²²War Powers Resolution, 50 U.S.C. §§ 1541-48 (1973).

This article will address that largely unexplored question. In doing so, it will challenge the underlying, often repeated premise of both the Administration and many of its critics that the President has exclusive control over operational and tactical decisions involving the conduct of military operations in wartime. Part I of the Article will discuss various theories as to where to draw the line between the President's Commander in Chief powers and congressional war powers once war has been authorized and initiated. Part II will review the history of the Commander in Chief clause as well as congressional efforts to limit the Executive's discretion in fighting a war. Part III will discuss the implications and lessons of that history, arguing that as a matter of history, policy and constitutional theory, Congress has broad, concurrent power to determine both strategies and tactics in fighting the war it has authorized. This last part will set forth a definition and understanding of concurrent powers over foreign affairs, an area which has thus far remained largely unexplored in both academic literature and judicial decisions.

Separation of powers doctrine generally operates on a horizontal axis to determine the proper boundaries between legislative, executive and judicial authority.²³ This article argues that the powers of Congress and the President to control the conduct of a war authorized by Congress is best understood on a sequential, not horizontal axis. Rather than drawing a boundary between legislative and executive power based on subject matter or some other normative principle, the two branches have concurrent power over the conduct of authorized warfare that is divided as a practical matter by timing, not subject matter. The President has the power of initiative, the ability and authority to act quickly in the face of rapidly changing wartime realities in the theatre

²³Clinton v. City of New York, 524 U.S. 417, 452 (Kennedy, J., concurring 1998); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 751 (1999).

of action, while the Congress has a more deliberative, reflective power, allowing it to check and limit presidential initiative before and after the Executive acts.

I. Theories of the Allocation of Authority Between Congress and the President Over the Conduct of Warfare

Commentators' and judges' attempts to distinguish the Administration's broad claims of Executive war-making authority from a narrow Commander in Chief power to direct military campaigns have led them to suggest or articulate several possible theories as to the proper allocation of authority between Congress and the President over the conduct of warfare. The first theory relies on the congressional authority to implement international law.²⁴ For example, two scholars accept that the President's sweeping power to conduct military operations would normally preclude Congress ordinarily from interfering with the President's control over battlefield operations, but argue that the congressional power to implement international law permits it to enforce treaty provisions which otherwise might constitute such interference, such as an attack on undefended towns.²⁵ Similarly Yale Law School Dean Harold Koh, while not limiting congressional power to the enforcement of international law, relies heavily on the principle that the President cannot violate fundamental human rights norms such as the prohibition on torture or genocide.²⁶

²⁴Jinks & Sloss, *supra* note 8, at 176-78; *Debate: Allocating the Nuclear War Powers Under the Constitution*, 94, 98-99, in *FIRST USE OF NUCLEAR WEAPONS* (Peter Raven Hansen ed., 1987) (John Norton Moore) (distinguishing congressional authority to prohibit weapons already barred by international law from weapons that are not).

²⁵Jinks & Sloss, *supra* note 8, at 174-77. For example, Jinks and Sloss argue that "If there were no international legal rule prohibiting, for example, the bombing of undefended towns, then Congress could not create such a rule; it would be beyond the scope of Article I. *Id.* at 176-77."

²⁶Koh, *supra* note 6.

One could also draw a line between the President's control over battlefield operations and Executive initiatives taken domestically purportedly to support military operations abroad. Indeed, that distinction was a basic thrust of both the majority and Justice Jackson's opinions in *Youngstown Sheet & Tube v. Sawyer*.²⁷ Under this theory, domestic surveillance of United States citizens allegedly communicating with al Qaeda would be treated differently than spying on the enemy in the theatre of military action. So too, presidential power to detain an American citizen seized at the Chicago airport as an enemy combatant seems different from an American citizen captured on the battlefield in Afghanistan. Indeed, the Supreme Court's opinions in *Hamdi* and *Hamdan* suggest that the President's Commander in Chief power should be cabined to military actions taken on or near an actual battlefield. In *Hamdi* the plurality distinguished between "initial captures on the battlefield," which were unreviewable, and the review process required "when the determination is made to continue to hold those who have been seized."²⁸ While the plurality was willing to "accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."²⁹ Furthermore the Court was willing to allow the President power to detain an American citizen captured on a foreign battlefield, but

²⁷343 U.S. 579 (1952). See also Jinks & Sloss, *supra* note 8, at 174-75 (distinguishing congressional power to regulate the treatment of detainees held in long-term captivity from the treatment of detainees on the battlefield).

²⁸*Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

²⁹*Id.* at 535.

emphasized the narrow “context” of that case, “a United States citizen captured in a foreign combat zone.”³⁰

Similarly, Justice Stevens’s opinion in *Hamdan v. Rumsfeld* rejecting the Administration’s attempt to unilaterally establish military commissions to try alleged terrorists, was premised on the distinction between military necessity on the actual battlefield in the midst of combat and the claimed necessity to detain or try a detainee several years after his or her removal from the battlefield. For Justice Stevens and the plurality, military commissions to try enemies who violate the laws of war—the type the Bush Administration sought to implement—were premised on the “need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield.”³¹ The Administration, however, had failed “to satisfy the most basic precondition” for its establishment of military commissions—“military necessity.”³² Justice Stevens noted that Hamdan’s tribunal was not “appointed by a commander in the field of battle, but by a retired major general stationed away from any active hostilities, . . . [and] he was not being tried for any act committed in the theatre of war.”³³

Justice Stevens, in a section of the opinion representing the court’s majority, returned to the distinction between military necessity on the battlefield and the general conduct of warfare when discussing the statutory requirement that procedures for military commissions must be the

³⁰*Id.* at 523. Apparently, the Administration was uncertain enough as to whether the Supreme Court would permit Executive detention of an enemy citizen captured in the United States that it chose to prosecute Jose Padilla on criminal charges rather than continue to detain him as an enemy combatant and risk Supreme Court review of that detention.

³¹*Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2782 (2006).

³²*Id.* at 2785.

³³*Id.*

same as those used to try American soldiers in court martials (which they clearly were not) unless the Administration could demonstrate that the court martial procedures would not be “practicable.” The Court emphasized that the requirement that any deviation be necessitated by a showing of the impracticability of court martial procedures, “strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in *the theatre of war*.”³⁴ While *Hamdan* did not address the question of whether the President has any independent power, absent congressional authorization to convene military commissions, the court did state that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers placed on his powers,” and suggests that whatever independent power the President has to convene such commissions is confined to action taken in the actual theatre of war or on the field of battle.³⁵

A third possible line that one might draw between Congress’s power over warfare and the President’s Commander in Chief powers would be between general rules or policy determinations concerning the conduct of warfare and specific tactical commands tailored to particular battles or campaigns.³⁶ Such a line would comport with both broad separation of powers theory and the text of the Constitution. Congress’s lawmaking function permits it to set

³⁴*Id.* at 2793.

³⁵*Id.* at 2774.

³⁶*See, e.g.,* Ramsey, *supra* note 8, at 1242-42 (distinguishing between Congress’s ability to impose general regulations on the conduct of military personnel and a legislative effort to control specific tactical directions or provide tactical commands as to particular battles); *Hearings*, *supra* note 7, at 9 (testimony of David J. Barron, Professor of Law, Harvard Law School, distinguishing between day to day operational control over military issues and “rule-like definitions of the nature, size, and duration of the force available to the President”).

broad policy decisions relating to military affairs and more generally to set policy for the nation.³⁷ Congress generally sets forth the nation's overall policies, the President's duties are to implement and enforce those policies. Furthermore, the constitutional concern with congressional interference with the President's Commander in Chief power over warfare typically focuses on congressional micromanagement of the conduct of war. As then Assistant Attorney General William H. Rehnquist expressed it in a 1970 memo, a serious constitutional problem would arise "should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander in Chief of the armed forces."³⁸ Congressional power over broad policy or general rules would appear to alleviate the concern over legislative micromanagement of a conflict, leaving to the President absolute discretion over specific tactical decisions such as where to place troops, or which hill to attack.

The rule/tactic dichotomy also has some support in the constitutional text. Congress is given the power "to make *rules* for the government and regulation of the land and naval forces" and "to make Rules concerning captures on land and water."³⁹ That language suggests that Congress has the power to make general rules for the detention, interrogation or trial of enemy combatants captured by the United States.

³⁷Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952); *Hearings*, *supra* note 7 (testimony of Bradford Berenson, former Associate Counsel to President George W. Bush).

³⁸Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to the Hon. Charles W. Colson, Special Counsel to the President, Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries 21 [hereinafter Rehnquist memo] (May 22, 1970). *See also* John Yoo, Los Angeles Times, Opinion, Congress at War, Apr. 2, 2007 ("Congress is too fractured, slow and inflexible to micromanage military decisions that depend on speed, secrecy and force").

³⁹U.S. CONST. art. I, § 8.

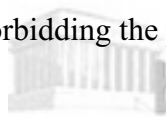
While each of these three potential line-drawing theories has appeal, none as a theoretical or historical matter accurately describes the proper allocation of authority over the conduct of warfare between the legislature and the Executive authority. The first, that the Executive's broad power to conduct military operations is limited primarily by Congress's authority to enforce international law is clearly underinclusive. While congressional power certainly includes the important authority to implement international law rules—for example, to prohibit the torture or summary execution of prisoners—the congressional power to make rules concerning “captures” or for the “regulation of the army” would seem to allow Congress to proscribe military conduct that does not violate international law. Congress could therefore presumably require that prisoners of war captured on the battlefield be treated in a particular manner or transferred to particular locations if their detention were long-term, or given a particular type of hearing to determine their status, even if those rules were not required by international law. Congress should be able to decide to close the Guantanamo camp, to require that the prisoners held there be transferred to prisons in the United States, and be given hearings or trials under procedures that Congress deems fair, whether or not any of those “rules” are also contained in international law. So too, Congress might authorize warfare against another nation, but prohibit the use of tactical so-called bunker buster nuclear weapons by United States forces—even if Congress believed that the use of such nuclear weapons was not prohibited by international law.⁴⁰ Moreover, Congress can and has told the President what ships he may capture in conducting naval warfare even though those instructions were not dictated by international law.⁴¹

⁴⁰See remarks of Paul Warnke former Assistant Secretary of State in “Debate,” *supra* note 24, at 96.

⁴¹See pages ____ - ____ *infra*.

The second theory of congressional power also seems underinclusive. While the line between battlefield and homefront does have great relevance, it does not accurately describe congressional power over the conduct of warfare. Congress has the power to prohibit torture or the summary execution of prisoners, or other abusive conduct by soldiers, whether such acts occur in the United States, Guantanamo, or on battlefields in Afghanistan or Iraq. Congress also has the power to set funding limitations both for the military stationed in the United States and for military actions abroad. Logically, theoretically and historically there is no reason to limit congressional authority to make rules and regulations for the military forces or for captures on land or seas to non-battlefield situations. Indeed, the congressional power to make rules for captures on land or sea would seem to almost by definition include battlefield captures, because that would be where most captures would take place.

The third theory—based on the distinction between general rules and specific tactics—also has a surface appeal, but is unworkable when applied to specific issues because the line between policy and tactic is too amorphous and hazy. For example, how does one decide whether the use of waterboarding as a technique of interrogation is a policy or specific tactic? Even if it is arguably a specific tactic, Congress could certainly prohibit that tactic as antithetical to a policy prohibiting cruel and inhumane treatment. So too, President Bush's surge strategy in Iraq could certainly be viewed as a tactic to promote a more stable Iraq, but could also be viewed as a general policy which Congress should be able to limit through use of its funding power. Tactical decisions to use particular weapons such as chemical weapons, nuclear weapons or cluster bombs can be limited by congressional rules designed to address the problem generally by forbidding the production or use of chemical weapons, or simply refusing to fund such weapons



systems.⁴² Congress could also, however, enact more limited and specific restrictions such as prohibiting the use of nuclear weapons or land mines in a particular conflict or even a particular theatre of war. Indeed, most specific tactics could be permitted or prohibited by means of a rule, and most policies reflect a certain tactical orientation. In short, the distinctions between strategies and tactics, rules and detailed instructions, or policies and tactics seem indeterminate.

Take, for example, Congress's attempt after the Nixon Administration's 1970 "incursion" into Cambodia to prohibit any such future actions by providing that "none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisors to or for Cambodian military forces in Cambodia."⁴³ Some commentators argued that a presidential decision to attack North Vietnamese sanctuaries in Cambodia was a "tactical maneuver" within the President's "complete and exclusive power," and that therefore any congressional prohibition of such tactical decisions would be unconstitutional.⁴⁴ However, such

⁴²For example, Congress has limited the transportation, deployment, storage and disposal of chemical and biological weapons. 50 U.S.C. §§ 1511-20 (1982). Pub. L. No. 98-525, 98 Stat. 2492 (1984). Congress has prohibited research and development of small mobile missiles. Pub. L. No. 98-94, 97 Stat. 614, § 206 (1983). Recently, Congress refused to fund a new generation of so-called bunker buster nuclear weapons. COLE & LOBEL, *supra* note 6, at _____. See generally Allan Ides, *Congressional Authority to Regulate the Use of Nuclear Weapon*, in Raven-Hansen, *supra* note ___, at 69, 80-82.

⁴³Special Foreign Assistance Act of 1971, Pub. L. No. 91-652 § 7(a), 84 Stat. 1942, 1943 (1971).

⁴⁴Robert H. Bork, *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT'L L. 76, 79-80 (1971); JOHN NORTON MOORE, LAW AND THE INDO-CHINA WAR 566 (1972); William H. Rehnquist, *The Constitutional Issues*, 65 N.Y.U. L. REV. 628, 638 (1970) ("The President's determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision traditionally confided to the Commander-in-Chief in the conduct of armed conflict."); John Norton Moore, *The Legality of the Decision to Intercede in Cambodia*, 65 AM J. INT'L LAW 38, 63 (The facts "strongly suggest that the action is most appropriately characterized as a command decision incident to the conduct of the Vietnam

a use of American military power clearly reflected a major policy decision that escalated the conflict and had important effects and consequences for United States foreign policy, and as one commentator put it “was not purely a tactical field decision.”⁴⁵ Indeed, then assistant Attorney General William H. Rehnquist wrote that a congressional restriction providing that United States troops not be sent into Laos or Thailand in connection with the Vietnam conflict was accepted by the Executive, thereby suggesting that such restrictions did not impermissibly interfere with the President’s tactical military decisions as Commander in Chief.⁴⁶

Virtually all important decisions as to the conduct of a war—whether to escalate or de-escalate, institute a “surge,” treat prisoners consistently with the Geneva Convention etc.—can be framed as “tactical” military decisions for the President to make as Commander in Chief, or broad policy decisions for Congress to make under its war powers. One could look at each of these issues as a matter of degree by focusing on the specific issue in dispute. Obviously certain decisions, such as “send this division to take this particular town” have a more tactical feel than “invade Cambodia,” but as a general matter the policy-tactic dichotomy is unlikely to be helpful when analyzing disputes that are likely to arise between the President and Congress. Congress is highly unlikely to enact laws interfering with tactical command decisions unless it believes that the decision is important to national policy. But it is precisely those types of issues that the policy/tactic dichotomy is ill-equipped to resolve.

War.”); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 916 (1994) (concluding that given the “colorable tactical necessity for the Cambodian border incursion,” congressional restrictions prohibiting the President from taking such action would be unconstitutional).

⁴⁵William D. Rogers, *The Constitutionality of the Cambodian Incursion*, 65 AM. J. INT’L LAW 26, 35 (1971).

⁴⁶Rehnquist memo, *supra* note 38, at 21.

Even if one looks at decisions which appear on the surface to be of a tactical military nature, applying the policy/tactic distinction does not yield a clear result. If Congress, for example, were to instruct the President to bomb certain railway lines in enemy territory, that would seem to be a tactical military decision within the core Commander in Chief power. Generally it would be ludicrous for Congress to so interfere with the military's conduct of warfare. But suppose railway lines are being used to transport thousands of civilians to death camps, as the Nazis did in World War II, and that despite this knowledge an American President decided not to use our air power to destroy those lines and thereby save thousands of civilians (a decision the Roosevelt Administration unfortunately made). Then, if Congress could summon the political will to enact (presumably over Presidential veto) legislation that required the President to bomb railway lines used to transport civilians to death camps, would it be an impermissible infringement on the President's tactical decisionmaking? Congress would be expressing a policy or rule, that it wanted to use our military power to protect these civilians, leaving to the President the determination of how best to tactically implement that policy. Thus bombing particular railways could reflect either a policy or tactic depending on the situation. The question really is not whether some decision reflects either a tactic or general policy—but which branch should have ultimate authority to make these decisions.

Moreover to the extent that the concern is congressional micromanagement of the conduct of our armies in the field, the rule/tactic distinction does not really address that concern. For example, Bradford Berenson, the former Associate Counsel to President Bush recently told a congressional committee that “if Congress were to enact a law providing that no American soldier could be sent into combat without body armor, there would be a strong argument that such an enactment impermissibly interferes with the commander in chief's discretion to order

lightly armed or lightly equipped troops to proceed by stealth into battle in appropriate circumstances.”⁴⁷ But such a law clearly sets forth a general rule or policy; the objection to it is not that it is too narrowly focused on particular tactics, but that it sweeps too broadly, thus depriving the President of necessary discretion and flexibility. But precisely because laws are general rules or policies, they deprive the President of discretion which he or she claims necessary to fight a war. Indeed, President Bush’s objection to the McCain Amendment prohibiting torture or cruel and inhumane treatment was structurally similar to Berenson’s; that the rule would deprive him of necessary discretion in special circumstances, to use methods of interrogation that would not be countenanced under the general prohibition. Thus, if the goal is to accord the Commander in Chief the flexibility to fight a war, the rule/tactic distinction is of no use, and indeed may be counterproductive.

Finally, attempting to draw any line based on how close a particular area is to tactical orders will lead legislators and Executive officials to argue about which category a particular legislative restriction fits into, an inquiry that is likely to lead to a sterile debate over categorization which will not confront the underlying realities and constitutional values that ought to determine which branch should have ultimate control. The history of the pre-New Deal Court’s attempt to deal with the overlapping authority between the states and federal government to regulate economic activity within a state that affects the broader economy by means of formal categories such as direct versus indirect effects should give one pause before proceeding down

⁴⁷Testimony of Bradford A. Berenson, United States Senate Committee on the Judiciary, “Exercising Congress’s Constitutional Power to End a War, Jan. 30, 2007.

that path in the equally murky area of conflicting authority between the President and Congress over the conduct of an authorized war.⁴⁸

The inability of any of these theories to accurately draw a coherent and useful line between Congress's supervisory power over the conduct of authorized warfare and the President's Commander in Chief power to conduct warfare leads to a normative and structural inquiry as to which branch ought to have power in which circumstances over the conduct of warfare.

The first possibility is to eschew an attempt at drawing a clear line between the President's Commander in Chief power and Congress's war powers and adopt some form of contextual, balancing approach to determine whether Congress has impermissibly interfered with the Presidents's Commander in Chief powers. In recent years the Supreme Court has often employed a sort of balancing test to decide separation of powers issues, asking whether legislation "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."⁴⁹ That type of analysis would analyze the constitutionality of any particular restriction by asking whether the statute involved prevents the President "from accomplishing [his] constitutionally assigned functions" and whether the extent of the interference with the President's Commander in Chief

⁴⁸Wickard v. Filburn, 317 U.S. 111 (1942) ("[Questions] of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and indirect."); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

⁴⁹Morrison v. Olson, 487 U.S. 654, 695 (1988).

powers is nonetheless “justified by an overriding need to promote objectives within the constitutional authority of Congress.”⁵⁰

Another balancing approach might look at elements of each of the different theories of Commander in Chief, as well as the history of congressional regulation of a particular issue, as Justices Jackson and Frankfurter articulated in *Youngstown*. That approach might ask (1) whether Congress was implementing an international law norm, such as the prohibition against torture or cruel and inhumane treatment; (2) whether the regulation involved conduct occurring in a military theatre abroad or activity in the United States more aptly characterized as domestic; (3) how detailed, specific and tactical an intrusion into military matters Congress had enacted; and (4) was this an area, like for example, military commissions, where congress had a history of regulation. Yet another contextual approach has been suggested by Professors Feldman and Issachoroff, who argue that “the constitutional test, in the spirit of Justice Jackson, should be whether Congress is defining the conflict in a way that makes realistic sense in the light of how modern conflict is actually fought and understood by modern combatants.”⁵¹

A critical difficulty with this type of approach is that its inherent lack of clarity and ambiguity will strongly shift the balance of power in favor of a strong President acting in disregard of congressional will. For example, the application of the Feldman and Issachoroff test asking whether the congressional restriction makes realistic sense in the modern world leads to utter confusion when applied to the current Administration’s confrontation with Congress and would undoubtedly embolden the President to ignore Congress’s strictures. For the President’s

⁵⁰Public Citizen v. DOJ, 491 U.S. 440, 485 (Kennedy, J., concurring) (1988).

⁵¹Noah Feldman & Samuel Issachoroff, *Congress has the Power to Make and End War—Not Manage It*, SLATE, Mar. 5, 2007.

advisors argue that the McCain Amendment's ban on cruel and inhumane treatment, or FISA's requirement of a warrant, does not make realistic sense in the context of the contemporary realities of the war on terror in which we face a shadowy, ruthless non-state enemy that has no respect for laws or civilized conduct, a conclusion hotly disputed by those opposed to the President's policies. To focus the debate over whether Congress has the power to control the treatment of detainees on the President's argument about the modern realities of warfare is likely to be both indeterminate and encourage the President to ignore and violate legislative wartime enactments whenever he or she believes that a statute does not make realistic sense, in other words when it conflicts with a policy the President believes does make sense and has adopted.⁵²

The contextual approach has a "zone of twilight" quality that Justice Jackson suggested in *Youngstown*.⁵³ It often will be that constitutional norms will matter less than political realities—and that the reality of wartime often is that a strong President will overwhelm both Congress and the Court. While it is certainly correct—as Jackson noted—that neither the Court nor the Constitution will preserve separation of powers where Congress is too politically weak to assert its authority, a fluid contextual approach is an invitation to Presidents to push beyond the constitutional boundaries of their powers and ignore legislative enactments that seek to restrict their wartime authority.

Moreover, a substantial problem with the contextual, balancing approach in the war powers context is that the judiciary is highly unlikely to resolve the dispute. The persistent

⁵²Such a test is also likely to invoke the very fears and passions that Madison and other framers thought could lead to executive aggrandizement during wartime. *See, e.g.*, Madison, Helvidius No. 4, in 6 WRITINGS OF JAMES MADISON 174 (G. Hunt. ed., 1906). *See generally* pages ____ - ____ *infra*.

⁵³*Id.* at 637 (Jackson, J., concurring).

refusal of the judiciary to adjudicate the constitutionality of the War Powers Resolution strongly suggests that the court will refuse to intervene to resolve disputes between the President and Congress over the constitutionality of a statute that a President claims impermissibly interferes with her conduct of an ongoing war,⁵⁴ leaving the political branches to engage in an intractable dispute over the statute's constitutionality that saps the nation's energy, diverts focus from the political issues in dispute and endangers the rule of law. Additionally, in wartime it will often be important for the issue to be resolved quickly, which is not usually the forte of the judiciary. To the extent that a constitutional consensus could be developed as to Congress's ability to check the President's conduct of warfare, that consensus might help embolden future Congress's to assert their power. Such a consensus might also help prevent crisis, chaos and stalemate that comes when the two branches assert competing constitutional positions and judicial review is unavailable to resolve the dispute.

Moreover, the adoption of a contextual, realist approach will undermine and not aid the cooperation and compromise between the political branches that is so essential to success in wartime. For while one might argue that an unclear, ambiguous division of power between the branches whereby each branch is uncertain of its legal authority would further compromise and cooperation, modern social science research suggests that the opposite occurs.⁵⁵ For each side in the dispute is likely to grasp onto aspects or factors within the ambiguous or complex reality to support its own self-serving position, hardening each side's position and allowing the dispute to

⁵⁴See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

⁵⁵See Leigh Thompson & George Loewenstein, *Egocentric Interpretation of Fairness and Interpersonal Conflict*, 57 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 176 (1992). See also Ronald H. Coase, *The Problem of Social Cost*, J.L. & ECON. (Oct. 1960).

drag on, as has happened with the ongoing, unresolved dispute over the constitutionality of the War Powers Resolution.

The second alternative would be to make a normative judgment as to which branch is structurally and functionally better situated to make the ultimate decision on military tactics and strategies involving the conduct of warfare. It could be argued that the President has access to greater information, more expertise in wartime decisions, can move more decisively and with greater speed and that therefore that the President's Commander in Chief power to conduct war should predominate. So long as the President is making what can plausibly be viewed as a military, operational decision involving the conduct of an authorized war, his or her decision is plenary and Congress cannot constitutionally interfere.

That position does have the advantage of drawing a clear line and it approximates the position Bush Administration officials have proffered. But it is inconsistent with the clear constitutional design to provide a check on the President's power to conduct warfare. The Constitution's text provides such checks not only by requiring that Congress must authorize the initiation of warfare, but also by according Congress substantial power once war breaks out: to regulate captures, to provide rules for the armed forces, to provide funding for warfare, to raise an army, to define offenses against the law of nations and to issue letters of marque and reprisal. A virtually unlimited and unchecked presidential power to fight wars is not only inconsistent with the words of the constitutional text and the framers' intent, but with the broad conceptions of checks and balances that our history has read into those words. Our Constitution has been viewed as providing a system both strong enough to defend and sustain the republic yet weak

enough to prevent one individual from arrogating to himself all power to conduct war. As the plurality put it in *Hamdi*, “a state of war is not a blank check for the President.”⁵⁶

My alternative starts by challenging the common understanding that the President has exclusive authority over battlefield operations and that Congress cannot interfere with the conduct of campaigns. As a matter of constitutional logic and history that usually agreed on proposition is untenable.⁵⁷ As Part II of this article will demonstrate, throughout our history—from the quasi-war with France to the Civil War to the Vietnam conflict, Congress has enacted legislation that interfered with the President’s so-called exclusive authority over battlefield operations and campaigns. Moreover, the constitutional grant of authority to the President to be Commander in Chief was not designed by the framers to preclude congressional authority over the conduct of warfare. Rather, the framers’ grant to Congress of the powers to raise and support armies, to declare war, to issue letters of marque and reprisal and to provide rules for the armed forces and rules governing captures was designed to provide important checks on the President’s Commander in Chief power. Those congressional powers cannot be limited either textually nor in any logically sensible fashion. For example, Congress’s power to raise an army means that it can raise an army with certain weapons, not others and a certain number of troops and no more. As Professor Stephen Carter points out

Nothing in the language or structure of the Constitution suggests a distinction between rules limiting the number of tanks and limiting the theatres of operation. One might, I suppose, try to argue that restrictions on the number of soldiers or amount of equipment are limits on what the armed forces shall *be*; stipulations on where or how these forces fight are limits on what

⁵⁶*Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

⁵⁷See Part II, *infra* pages ____ - ____ for a full discussion of the restrictions Congress has placed on the Commander in Chief’s power to conduct war throughout our history.

the armed forces may *do*. But that difference, if it is a difference—is merely semantical.⁵⁸

Congress can therefore say the army shall not *be* one with nuclear weapons or that it shall have nuclear weapons but only use them in response to a nuclear attack—both of which would be important restrictions on the President’s ability to use tactical nuclear weapons in a battlefield situation. Or the Congress could and has said that it will be an army that does not use ground troops in particular conflict, or does not torture prisoners. All these restrictions, which Carter views as definitional and nearly always constitutional, effectively say “We have created this army, not that one.”⁵⁹

So too, the congressional power to declare or authorize war has been long held to permit Congress to authorize and wage a limited war—“limited in place, in objects and in time.”⁶⁰ When Congress places such restrictions on the President’s authority to wage war it interferes with the President’s discretion to conduct battlefield operations. For example, Congress authorized President Bush to attack Iraq in response to Iraq’s 1990 invasion of Kuwait, but it confined the President’s authority to the use of United States armed forces pursuant to Security Council resolutions directed to force Iraqi troops to leave Kuwait, that restriction would not have permitted the President to march into Baghdad after the Iraqi army had been decisively ejected from Kuwait, a limitation recognized by President Bush himself.⁶¹ Yet that restriction seems to

⁵⁸Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION WHO DECIDES?* 109, 113 (Peter Raven-Hansen ed., 1987) (emphasis in original).

⁵⁹*Id.*

⁶⁰*Bas v. Tingy*, 4 U.S. 37, 43 (1800).

⁶¹House Joint Resolution 77, 105 Stat. 3 (1991). Bush and his national security advisor later explained that one of the reasons that he did not order a march to Baghdad was that “our

be the very kind of limitation on a President's tactical battlefield command that the traditional dicta would not permit. But if Congress can thus limit the purpose of the war against an enemy, why could it not impose other similar restrictions—limiting for example the theatre of war, or even the places the military can attack. If the Persian Gulf Resolution was constitutional—and nobody claimed it was not—why could not Congress have authorized war against Germany for the purpose of protecting Britain and liberating Western Europe, but not permitting combat operations into Germany or other theatres of action such as the Middle East or North Africa. Congress would never have done so, but the 1991 Persian Gulf authorization suggests that it could have. Nor is the 1991 Persian Gulf authorization an anomaly; Congress has limited the objects, purposes and tactics Presidents could use in conducting war throughout our history.

Congress and the President therefore share concurrent authority over the conduct of warfare once it has been authorized by Congress, and the only Commander in Chief power that Congress is precluded from removing is the President's power to command the military. Congress cannot appoint itself commander nor establish a committee of Congress to be military commander, nor can it force the President to remove a commanding general that Congress does not like. Nor can Congress prevent the President from dismissing an officer, nor dictate which

stated mission, *as codified in UN resolutions* was a simple one—end the aggression, knock Iraq's forces out of Kuwait, and restore Kuwait's leaders. To occupy Iraq . . . would have taken us way beyond the imprimatur of international law bestowed by resolutions of the Security Council" GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 464 (1998). While Bush did not recognize the constitutional necessity for Congress's authorization of the war, that fact is that Congress did specifically authorize him to act and limited his discretion to use American troops to removing Iraqi troops from Kuwait as opposed to providing him unlimited authorized to attack Iraq. See FISHER, *supra* note 20, at 172-73.

officers will be appointed to which commands, although even in this area Congress has adopted rules and procedures that have limited, but not taken away the President's powers to command.⁶²

As a normative matter, while the two branches exercise concurrent authority over the conduct of warfare, in case of conflict Congress's power predominates. While the President's access to information, closer contact with military commanders and experience in dealing with foreign affairs and military matters means that in most situations he or she acts independently with the military commanders to determine military policy and strategy, in cases where Congress believes that there is strong policy reason to adopt a strategy or tactic, the decision of the more deliberative, representative body of government must be able to provide a check on the Executive's war power. Moreover, to say that the President and Congress share concurrent powers as a constitutional matter requires that the President obey the dictates of the laws Congress enacts. For it is the Executive's duty to execute the laws, and only if the Constitution

⁶²See Richard Hartzman, *Congressional Control of the Military in a Multilateral Context*, 162 MIL. L. REV. 50 (1999) (arguing that Congress may prohibit the President from appointing a United Nations commander to command United States troops and more generally has the power to enact selection criteria for commanders under the congressional power to make rules for the government and regulation of the armed forces). Compare with an opinion of the Justice Department's Office of Legal Counsel, which argues that such a restriction is an unconstitutional infringement on the President's Commander in Chief power. *Placing of United States Armed Forces Under United Nations Operational or Tactical Control* 20, O.L.C. Op. 182 (1996). See also WORMUTH & FIRMAGE, *infra* note 72, at 87-104. For example, at the outset of the Mexican War, President Polk sought to appoint Senator Thomas Hart Benton of Missouri to take command of all United States military forces in the field. However, since Major General Winfield Scott was a Major General and it was understood that the Articles of War required that the officer of highest rank hold the post of commanding general, Polk sought to have Congress create a new position of Lieutenant General which would out rank Scott and therefore allow him to appoint Benton. Congress failed to do so, and Polk was forced to give Scott command of the campaign in Southern Mexico. *Id.* at 89. Moreover the 1947 National Security Act required that the Secretary of Defense, not the President can give orders directly to the armed forces. In the days before Nixon's resignation of the Presidency, Secretary of Defense and the Joint Chiefs of Staff took precautions to insure that no orders from the White House were transmitted to the army except through the constitutional and legislated chain of command. *Id.* at 92.

precludes Congress from exercising a certain power because it is granted solely to another branch, can the President avoid complying with the law.⁶³

As Part IV argues in more detail, this allocation of power shifts the constitutional analysis away from the attempt to create a substantive division of power based on a dividing line or balancing test assigning various subject matters to one branch or the other. Rather it recognizes the practical division of power based on timing and initiative. The greater speed with which the Executive can act, the need for a unified command and the recognition that warfare cannot be conducted by committee led the framers to make the President, not Congress the Commander in Chief with the independent constitutional power to conduct warfare once Congress decides that war is necessary. But that power was not to be unchecked, but rather subject to the oversight of the broadly representative branch of government.

As a structural matter, according Congress the power to override or limit the President's conduct of warfare preserves the balance of power between the branches. Were the President to have sole power over tactics and strategies to conduct warfare, Congress would, as a practical matter, have little check on the President. The only power Congress would then be able to exert would be to refuse to provide any funds for the war or impeach the President, both of which require supermajorities (assuming the President vetoes an appropriations bill that contains no funding for a war), or require Congress to shut the government down if agreement cannot be reached. But to permit Congress to predominate where there is disagreement still gives the President substantial power to check congressional action. The President wields the veto power, which requires Congress to muster a supermajority if it wants to enact any restriction. The

⁶³Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637-38 (Jackson, J., concurring) (1952) (describing third category).

President's veto power ensures that nothing less than a strong consensus in Congress could limit his discretion with respect to the conduct of war.⁶⁴

Thus, in the absence of legislation to the contrary, the President can exercise the powers of a military commander under the laws of war to capture and detain prisoners, order soldiers into battle and direct military campaigns. In most situations, the President is thus free to exercise discretion as to how to conduct warfare in the theatre of combat, bounded only by the laws of war. Moreover, as a practical matter Congress simply cannot control the ebb and flow of battles, direct troop movements, draw up battle plans and the like. But the President's power to conduct war can be superseded or restricted by Congress if for reasons of national policy, it desires to limit Executive discretion. In sum, the Commander in Chief clause gives the President initiative to act in the absence of legislation in conducting military campaigns, but does not provide the President power to disregard legislation regarding the conduct of warfare.

One might object that such broad congressional power would allow it to micromanage a war by issuing detailed instructions to the military—and that such legislation would both be harmful to the conduct of a war and counter to the framers concerns about legislative interference with the management of war. We can all agree that as a general matter, Congress should not micromanage military campaigns, and historically Congress has not done so. Nor is it generally wise for Congress to micromanage other federal agencies besides the military. But Congress has

⁶⁴See Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Power: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1385 (2006) (arguing that the separation of powers test should focus on the critical checks and balances functions in determining whether Congress or the President has exceeded its authority). The President also has, of course, the power to implement the law, and while he must enforce the law as Congress wrote it, he often has considerable enforcement discretion that allows the President to share the military's enforcement effort in a manner that is most consistent with both the law and the President's policy desires, as Lincoln did during the Civil War. See page ____ *infra*.

the power to do so, and it is political not constitutional considerations that have prevented Congress from doing so. Where a large majority of Congress feels strongly about a particular issue involved in the conduct of a war, as was the case when Congress enacted the McCain Amendment forbidding United States forces to use torture or cruel and inhumane treatment, it has the constitutional authority to limit the discretion of the Commander in Chief.

II. History of Congressional Restrictions on the President's Power to Conduct Warfare

Throughout American history, Congress has placed restrictions on the President's power as Commander in Chief to conduct warfare. On numerous occasions, Congress has authorized the President to conduct warfare but placed significant restrictions on the time, place and manner of warfare. Congress has regulated the tactics the President could employ, the armed forces he could deploy, geographical area in which those forces could be utilized, and the time period and specific purposes for which the President was authorized to use force. Its regulations have both swept broadly and set forth detailed instructions and procedures for the President to follow. This historical practice is consistent with the Constitution's text and framer's intent which made clear that the President was not to have the broad powers of the British King, but was subject to the control and oversight of Congress in the conduct of warfare.

A. The Constitutional Design

The framers' decision to grant the President the power of Commander in Chief of the nation's armed forces was noncontroversial. The President was granted such power to ensure civilian supremacy and control over the military; one of the accusations the Declaration of Independence made against King George III was that he had "affected to render the Military

independent of and superior to the Civilian Power.”⁶⁵ The only real dispute in the state ratifying conventions was whether to allow the President to command the army in person, which was thought by some to be dangerous. As George Mason, a delegate to the convention noted in the Virginia Ratifying Convention there was agreement as to “[t]he propriety of his being commander in chief, so far as to give orders and have a general superintendency.”⁶⁶

The framers generally expressed strong concerns about a wartime executive aggrandizing power. John Jay warned that “absolute monarch will often make war when their nations are to get nothing by it,”⁶⁷ Madison characterized war as “the true nurse of executive aggrandizement,”⁶⁸ and Hamilton acknowledged that “[i]t is of the nature of war to increase the executive at the expense of the legislative authority.”⁶⁹

Nevertheless, there can be no question that the framers intended to vest in the President the power to conduct a duly authorized war as Commander in Chief. As Alexander Hamilton explained,

Of all the cases or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the

⁶⁵FISHER, *supra* note 20, at 12. *See also* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 646 (J. Jackson) (1952) (“The purpose of lodging dual titles in one man was to insure that the civilian would control the military . . .”).

⁶⁶3 DEBATES IN THE SEVERAL STATE CONSTITUTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 496 (John Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES]. Joseph Story, in his *Commentaries on the Constitution*, wrote that at the ratifying conventions, “The propriety of admitting the President to be Commander in Chief, so far as to give orders and have a general superintendency, was admitted.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1492.

⁶⁷THE FEDERALIST NO. 4, at 18, 19 (John Jay) (Jacob Cooke 1961).

⁶⁸James Madison, Letters of Helvidius, No. IV (1773), *reprinted in* 6 WRITINGS OF JAMES MADISON 174 (G. Hunt ed., 1906).

⁶⁹THE FEDERALIST NO. 8, at 44, 46 (Alexander Hamilton) (Jacob Cooke 1961).

exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.⁷⁰

While the original language of the Constitution gave the legislature the power “to make war,” Madison and Gerry moved to substitute *declare* for *make*, “leaving to the Executive the power to repel sudden attacks.”⁷¹ Madison’s motion carried at first by a vote of 7-2, but after Rufus King explained that “make” might be interpreted as authorizing Congress not only to initiate but also to conduct war, Connecticut changed its position, so that the vote was now 8 to 1 in favor of Madison’s motion.⁷² One can conclude from this sequence that the wording was changed to permit the Executive to repel enemy attacks and to conduct wars that Congress had initiated.

But did the framers intend for the Commander in Chief power to allow the President to conduct military campaigns free from congressional interference? Two important aspects of the Constitution’s text and historical background strongly indicate that they did not.

First is the framers’ use of the term Commander in Chief. The term was first introduced into English law by Charles I in 1639 during the First Bishops War.⁷³ Six years later, during the English Civil War, Parliament appointed Sir Thomas Fairfax Commander in Chief of its forces,

⁷⁰THE FEDERALIST NO. 74, 500 (Alexander Hamilton) (J. Cooke ed., 1961).

⁷¹II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-19 (Max Farrand ed., 1911).

⁷²*Id.* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 107 (1986). The official journal of the Convention records, however that on the first ballot, the amendment was defeated 4-5, leading Abraham Sofaer to conclude that King might have changed more votes than Madison’s journal reports. ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 393 n.130 (1976).

⁷³*Id.*

“subject to such orders and directions as he shall receive from both Houses or from the Committee of Both Kingdoms.”⁷⁴ The Commander in Chief’s office did not possess unfettered, sole power to lead, but rather was made subordinate to a superior such as parliament or the secretary of war, who could issue orders and instructions to him.⁷⁵ The Duke of Wellington complained that “the commander in chief cannot move a corporal’s guard from one station to another, without a route countersigned by the Secretary of War. This is the fundamental principle of the Constitution of the British Army.”⁷⁶

In 1775, George Washington was appointed “General and Commander in Chief” of the revolutionary army. Nonetheless, his commission as Commander in Chief did not accord him independence from the Continental Congress. Congress instructed Washington to follow the Articles of War it adopted, “and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress.”⁷⁷ Congress realized that

[W]hereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discrete management, as occurrences may arise from time to time fall out, you are therefore upon all such accidents or any occasions that may happen, to use your best circumspection and (advising with your council of war) to order and dispose of the said Army under your

⁷⁴WORMUTH & FIRMAGE, *supra* note 72, at 105.

⁷⁵Adler, *supra* note 20, at 525, 528.

⁷⁶*Id.* WORMUTH & FIRMAGE, *supra* note 72.

⁷⁷II JOURNALS OF THE CONTINENTAL CONGRESS 91, 96 (Worthington C. Ford et al. eds., 1904-1937).

command as may be most advantageous for the obtaining the end for which these forces have been raised . . .⁷⁸

Despite this grant of discretion, Congress continued to issue instructions on military tactics to the Commander in Chief. In 1775, it ordered Washington to intercept two British vessels,⁷⁹ and to send General Gates to take command in Canada and to send to Canada “such small brass or iron filled pieces as he can spare.”⁸⁰ In December 1776, Congress ordered General Putnam to send forces to harass the enemy into New Jersey. Generally Congress gave Washington the “*full* power to order and direct all things relative to the department, and to the operation of the war”⁸¹ but with the important limitation, “until Congress shall order otherwise.”⁸² While Congress often included in its instructions discretionary language such “as he shall judge proper” or “in case he should judge it practicable,”⁸³ sometimes this language was omitted.

A number of the state constitutions adopted during the revolution or shortly thereafter and still extant in 1787 provided that the governor of the state was to be Commander in Chief of its military forces, but contained explicit provisions subjecting that authority to the laws of the state.⁸⁴ For example the Massachusetts and New Hampshire Constitutions named the governor

⁷⁸*Id.* at 101, 108.

⁷⁹III JOURNALS OF THE CONTINENTAL CONGRESS 1774-88, 276 (1775).

⁸⁰V JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 448, 451 (1776).

⁸¹IV JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 1023 (1776).

⁸²*Id.* at 1027.

⁸³III JOURNALS OF THE CONTINENTAL CONGRESS 1774-89 (1775); XI JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 507, 684 (1778).

⁸⁴The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States (Benjamin Perley Poore ed., 1878). The Maryland Constitution of 1776 provided

or president of the state Commander in Chief of the army and navy, and of all the military forces of the state and entrusted the office with the powers “incident to the offices of captain-general and commander-in-chief, and admiral, to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and not otherwise.”⁸⁵

The British and revolutionary American history makes clear that the Commander in Chief did not have *sole* power to conduct warfare, but could direct military campaigns subject to congressional oversight. While some commentators claim that the framers gave the President the Commander in Chief power to conduct wars because they concluded that the Continental

that the Governor of the State *shall alone* have the direction of the militia, and of all the regular land and sea forces, “under the laws of this state.” Art. xxxiii at 825; Delaware Constitution of 1776 (“The president, with the advice and consent of the privy council, may embody the militia and act as captain general and commander in chief of them, and the other military force of this state, under the laws of the same.”); Art. 9 at 275. Massachusetts Constitution of 1780, Ch. II, § 1, art. VII (subjecting Commander in Chief power to rules and regulations of the Constitution, and the laws of the land) p. 966; New Hampshire Constitution of 1784, art. I, § 26 (same), 1288; Virginia Constitution of 1776, art. IV, § 4 (the governor shall “alone have the direction of the militia, under the laws of the country”), at 1911. The language in the New Hampshire constitution was repeated verbatim in the Constitution in adopted in 1792, while the Delaware constitution of 1792 changed the clause so that it did not contain any explicit language subjecting the Commander in Chief power to the laws of the state. *Id.* at 1296, 1302-03 and 282.

In 1789, Representative Thomas Tudor Tucker proposed several constitutional amendments including one which would have deleted the President’s power to be Commander in Chief—instead provided him the “power to direct (agreeable to law) the operations” of the armed forces. BERDAHL, *supra* note 20, at 119. Clarence Berdahl’s study of Executive war powers suggests that Tucker’s purpose was to ensure that the President could not command in person, while Abraham Sofaer’s study argues that its purpose was to limit President’s power to conduct war to the manner specified by Congress. Abraham Sofaer, *War Foreign Affairs and Constitutional Power*, THE ORIGINS 117 (1976). That the phrase agreeable to law was put by Tucker in parenthesis, suggests that this was not the purpose of his amendment, but rather reflects a common understanding contained in these state constitutions that the President’s power was subject to law. In any event, all of Tucker’s proposed amendments never got out of committee. 1 ANNALS OF CONG. 762, 763.

⁸⁵Poore, *supra* note 84, at 966, 1284.

Congress had proven itself ill-suited to that task during the Revolution,⁸⁶ it would have been odd and contradictory for the framers to have used the same title to describe an independent, exclusive power of the President that had been used to describe a position subordinated to Congress during the Revolution. Why would the framers have used the term Commander in Chief to describe a power to conduct military campaigns free from congressional interference, when it was that very title that Washington was given during the Revolution, when he had been subjected to such interference?

Second, had the Convention sought to augment the President's powers of Commander in Chief beyond what General Washington had possessed during the Revolution, it could have clearly done so by providing the Executive with the war powers the Commander in Chief had lacked during the Revolution. The framers had in the British model of war powers a handy and well-known constitutional scheme for an Executive branch that possessed such strong war powers. But the framers rejected that model, which, as articulated by Sir William Blackstone, assigned to the king the "sole prerogative to make war," to issue letters of marque and reprisal authorizing private persons to engage in warfare, and as the nation's first general, to raise and regulate the army and navy.⁸⁷ None of these war powers were given to the President. Rather, Congress was given the power to declare war, to issue letters of marque and reprisal, to raise

⁸⁶Allen Ides, *Congressional Authority to Regulate the Use of Nuclear Weapons*, in RAVEN-HANSEN, *supra*, First Uses of Nuclear Weapons at 69, 77. In fact, the main lesson that the revolution taught the framers was that Congress had to be given substantial power to obtain monies to supply the army, for it was that problem and not the micromanagement of military affairs by the Continental Congress that had proven to be most vexing during the Revolution. Raven-Hansen & Banks, *supra* note 44, at 893.

⁸⁷Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1201-02; EDWARD KEYNES, UNDECLARED WAR, TWILIGHT ZONE OF CONSTITUTIONAL POWER 22-25 (1982).

armies and navies, to make rules concerning captures on land and water, and to make rules for the regulation of the army and navy.⁸⁸

The framers made it clear that they rejected the British model of war powers. James Wilson argued that the “British model . . . was inapplicable to the situation of this Country,” a view shared by other framers.⁸⁹ Alexander Hamilton and James Iredell were even more explicit in distinguishing the powers of the British monarch and the American president.⁹⁰ As Hamilton wrote in *Federalist No. 69*:

The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy, while that of the British King extends to the *declaring* of war and *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.⁹¹

The assignment to Congress of the power to issue letters of marque and reprisal is instructive of the limitations on the Commander in Chief’s power. By the late 1700s, the term *marque and reprisal* had come to have two meanings. The first, more traditional usage of the term was to denote letters issued by the king to private individuals—privateers, usually merchant

⁸⁸U.S. CONST. art. I, § 8.

⁸⁹Fisher, *supra* note 87, at 1202.

⁹⁰Adler, *supra* note 20, at 529.

⁹¹ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST 448 (Modern Library 1937) (emphasis in original). James Iredell, Later an associate justice of the Supreme Court made the identical point in the North Carolina Ratifying Convention; 4 ELLIOT’S DEBATE, *supra* note 66, at 107-08.

vessels—which were outfitted with guns and authorized to fight on behalf of the government.⁹² By the late 1700s, the term had also come to mean more generally measures short of full-scale war that one government waged against another—known as reprisals.⁹³ The framers meant to incorporate both meanings, and traditional letters of marque and reprisal were relied on during the United States' early wars when our naval forces were relatively weak or virtually non-existent.⁹⁴ By allowing Congress the authority to issue such letters, the framers gave Congress not only power over the initiation of warfare, but over the conduct of naval warfare, in particular the power to determine who would be authorized to fight on behalf of the government and the scope of and limitations on their authorization.

The framers assigned Congress the bulk of the federal government's war powers in large measure because of their fears of an unchecked wartime President. Again and again the framers emphasized that the dangers of Executive aggrandizement inherent in warfare were to be checked by separating the sword and the purse and vesting control of raising and supporting armies in Congress.⁹⁵ Madison argued the power of the purse was “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”⁹⁶ The framers' intent that the power of the purse was specially intended to be a broad

⁹²Jules Lobel, *Covert Wars and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1043-44 (1986).

⁹³*Id.* at 1044.

⁹⁴*Id.*

⁹⁵WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 30-31 (1994); Raven-Hansen & Banks, *supra* note 44, at 833, 896-97.

⁹⁶THE FEDERALIST NO. 58, at 391, 394 (Jacob Cooke 1961).

substantive check to control military activity is not only apparent in the remarks of the framers, but in the Constitution's text which supplemented the general legislative appropriation power with the specific power provided to Congress to raise and support armies and navies, a provision which could be seen as unnecessary but for the framers' desire to emphasize and ensure that the means for controlling the Executive in wartime would be placed in Congress's hands.⁹⁷

Moreover, in the debate at the ratifying conventions, the Federalists countered the Antifederalist argument that the President could become a military despot by emphasizing that Congress was provided substantial powers to check the President's Commander in Chief power. Federalist George Nichols argued in the Virginia convention that, "The President is to command. But the regulation of the army and navy is given to Congress. Our representatives will be a powerful check here."⁹⁸ Madison claimed that Congress's funding and other war powers would provide a sufficient check on the President's war powers because, "[t]he purse is in the hands of the Representatives of the people. They have the appropriation of all monies. They have the *direction* and regulation of land and naval forces."⁹⁹ So too, in the North Carolina ratifying convention, James Iredell argued that while the President is to command the military forces, that power "will be found to be sufficiently guarded," because Congress had been given many of the war powers of the British king.¹⁰⁰ Richard Spaight, who had been a delegate to the Convention,

⁹⁷*See generally* Raven-Hansen & Banks, *supra* note 44, at 890-99 (arguing that the power of the purse in national security matters was a substantive, not procedural power).

⁹⁸Documentary History of the Ratification of the Constitution 1281 (state Historical Society of Wisconsin 1990) (John P. Kamiski & Gaspare J. Saladino eds.) (speech of June 14, 1788).

⁹⁹*Id.* at 1282 (speech of June 14, 1788) (emphasis added).

¹⁰⁰IV ELLIOT'S DEBATES, *supra* note 66, at 107-08.

argued that Congress could control the Commander in Chief because it alone had the power to raise and support armies.¹⁰¹ Professor John Yoo summarizes this ratification history by arguing that “[A]s commander-in-chief the President would have the initiative in matters of war, but Congress could use its appropriation power to enforce its own policies.”¹⁰²

As a textual matter, the powers of the British king that were provided to Congress permit Congress to interfere with the President’s conduct of military campaigns. Congressional power to “make Rules for the Government and Regulation of the land and naval forces” clearly may be used to limit the President’s power to conduct military campaigns.¹⁰³ To the extent that Congress can prescribe the mode of behavior for the armed forces it can tell the military how it can and cannot conduct warfare. This power could severely limit the permissible tactics a President may order during a military campaign. So too, the constitutional text that grants Congress power to “make Rules concerning Captures on Land and Water” affords Congress great discretion in determining how the military shall detain, interrogate and try captured enemy soldiers.¹⁰⁴ Undoubtedly most importantly, the power to raise and support an army and navy was believed by the framers to provide a “complete” check on the President’s power to conduct warfare.¹⁰⁵ In short, the grant of powers to Congress that were traditionally exercised by the king contradicts the view that the President’s power as Commander in Chief is immune from congressional interference.

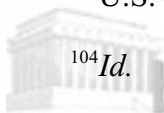
¹⁰¹*Id.* at 114.

¹⁰²John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1660 (2002).

¹⁰³U.S. CONST. art. I, § 8.

¹⁰⁴*Id.*

¹⁰⁵See text ____ - ____ *supra* and notes.



B. Early History, The Quasi-War With France

Our first war with a European power subsequent to the Constitution's ratification, the undeclared so-called quasi-war with France in the 1790s, illustrates Congress's use of its power to control the conduct of warfare. In response to increasing tensions between the United States and France, Congress enacted a series of carefully calibrated measures authorizing the President to conduct limited warfare against France. In May 1798, Congress authorized the President to act against armed vessels that had committed or were attempting to commit "depredations" on vessels belonging to United States citizens and to retake captured ships belonging to United States citizens.¹⁰⁶ In June 1798, Congress authorized private armed vessels of United States citizens to use force to defend against any "search, restraint or seizure" made by armed French vessels against them.¹⁰⁷ Less than a month later, Congress expanded the tactics the President could use by authorizing the President to use United States naval vessels and grant special commissions to United States owners of private ships to subdue and seize and capture any armed French vessel within the jurisdiction of the United States or on the high seas.¹⁰⁸ In 1799, Congress provided the President with the power to seize American vessels bound to French ports.¹⁰⁹

The war with France led to a series of Supreme Court opinions in which the court held that Congress could limit the President's power to conduct hostilities. In *Little v. Barreme*, a unanimous Supreme Court upheld the imposition of damages against a naval commander who

¹⁰⁶ Act of May 28, 1798, 1 Stat. 561.

¹⁰⁷ Act of June 25, 1798, 1 Stat. 572.

¹⁰⁸ Act of July 9, 1798, 1 Stat. 578.

¹⁰⁹ Act of Feb. 9, 1799, 1 Stat. 613.

had acted pursuant to a presidential order to seize a ship that he believed was illegally trading with France.¹¹⁰ Chief Justice Marshall's opinion for the Court recognized that the President might have inherent power as Commander in Chief to seize vessels illegally trading with the enemy in time of war.¹¹¹ Yet Congress had at least implicitly prohibited such military action when it authorized the President to seize ships traveling to French ports but did not provide similar authority for ships bound from a French port, as was the ship involved in this case.¹¹² Marshall accepted that President Adams's construction of that statute—authorizing naval commanders to seize ships both going to and coming from French ports—was undoubtedly preferable from a military standpoint and would provide more effective enforcement of the embargo against France.¹¹³ Nonetheless, the Court enforced the law's limitation of the President's power to conduct military operations and imposed individual liability on the naval commander for following President Adams's illegal instructions.¹¹⁴

The Court's opinion in *Little v. Barreme* enforcing a legislative circumscription of the President's Commander in Chief powers in wartime is supported by several other cases arising out of the undeclared war with France. In *Bas v. Tingy*, the Court unanimously held that France was an enemy for purposes of a law that permitted the salvage of enemy ships, despite the absence of a declaration of war.¹¹⁵ Three of the four Justices who wrote *seriatim* opinions agreed

¹¹⁰Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

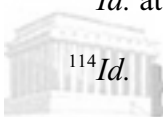
¹¹¹*Id.* at 177-78.

¹¹²*Id.*

¹¹³*Id.* at 179.

¹¹⁴*Id.*

¹¹⁵Bas v. Tingy, 4 U.S. (Dallas) 37 (1800).



that in the words of Justice Chase, “Congress is empowered to *declare* a general war, or Congress may *wage* a limited war, limited in place, in objects and in time.”¹¹⁶ As Justice Washington stated, a limited, undeclared war is known as an imperfect war, and “those who are authorized to commit hostilities, act under special authority, and *can go no further than to the extent of their commission*.”¹¹⁷ Justice Patterson also agreed that an undeclared or imperfect war was nonetheless war, in which “[A]s far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile actions.”¹¹⁸ In authorizing warfare against the French, Congress had severely limited the tactics President Adams could utilize; he was not authorized “to commit hostilities on land,” to capture unarmed French vessels, nor even to capture French vessels, lying in a French port.”¹¹⁹

The next year, in *Talbot v. Seeman*, Justice Marshall reiterated the basic principle articulated by Justices Chase, Washington and Paterson.¹²⁰ Marshall wrote that, “the whole powers of war being, by the constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides,” in determining whether Captain Talbot had a lawful right to seize an armed vessel commanded and manned by Frenchmen.¹²¹ Writing for a unanimous Court, Marshall recognized, as had Patterson, Chase and Washington in *Bas*, that Congress may authorize either a general war or a limited partial war.

¹¹⁶*Id.* at 43 (emphasis added).

¹¹⁷*Id.* at 40 (emphasis added).

¹¹⁸*Id.* at 45.

¹¹⁹*Id.* at 43.

¹²⁰*Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1800).

¹²¹*Id.* at 28.

These early cases contradict a broad claim of inherent Executive power over the conduct of warfare that Congress cannot interfere with. If Congress can deny the President the power to capture vessels believed to be trading with the enemy in time of war, surely Congress can also regulate and limit the detention and interrogation of enemy combatants in time of war. That Congress can proscribe certain military tactics in enforcing a trade embargo in time of war means that it has the power to regulate and limit military tactics in wartime. For as Justice Marshall suggests, in the absence of legislation, the Commander in Chief power would normally extend to capturing such vessels.

The *Little* case also indicates that Congress's regulation of military tactics can extend to and intrude on the President's tactical decisions on the battlefield. The "battlefield" of the 1790s war with France was the high seas. What ships to capture could certainly be viewed as a tactical, battlefield decision. Nonetheless, the Court held that Congress could limit the Commander in Chief's power, even if the President believed such limitations interfered with his prosecution of the war, as Adams undoubtedly did in that case.

More generally, the Court held that Congress has the power to authorize limited, undeclared war in which the President's power as Commander in Chief would be restricted. In such wars, the Commander in Chief's power would extend no further than Congress had authorized. As President Adams recognized, Congress had as a functional matter "declared war within the meaning of the Constitution" against France, but "under certain restrictions and limitations."¹²² Under this generally accepted principle in our early constitutional history, Congress could limit the type of armed forces used, the number of such forces available, the

¹²²9 THE WORKS OF JOHN ADAMS 81 (Charles Francis Adams ed., 1854), cited in Fisher, *supra* note ___, at 24.

weapons that could be utilized, the theatres of actions and the rules of combat; in short, it could dramatically restrict the President's power to conduct the war.

Subsequent authorizations of the use of force reinforced this basic principle that Congress can authorize full or limited warfare as it chooses. Throughout the nineteenth century, Congress repeatedly authorized the President to use limited force against other nations, slave traders and pirates.¹²³ When President Madison requested on June 1, 1812, that Congress consider declaring war, the House voted quickly to declare war. The Senate, however, considered limiting its authorization to war on the high seas, and a motion was passed to return the bill declaring war to the committee to authorize just warships and privateers to make reprisals against Britain.¹²⁴ However, when the modified bill limiting the war to the high seas was reported back for final action, it was defeated by a tie vote.¹²⁵ The Senate finally approved the declaration of war by a vote of 19-13.¹²⁶ The declaration of war authorized the President to use "the whole land and naval force of the United States."¹²⁷

In subsequent declarations of war after 1812, Congress continued the practice of providing that the President is authorized and directed to employ the entire naval and military

¹²³Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2073 (2005). As Professor Bradley and Goldsmith point out, most authorizations to use force in U.S. history have been of a limited, partial nature. *Id.*

¹²⁴FISHER, *supra* note 20, at 38; Donald R. Hickey, *The War of 1812, A Forgotten Conflict*, 44-45 (1989).

¹²⁵ANNALS OF CONGRESS, 12th Cong., 1st Sess. 270-71 (1812).

¹²⁶*Id.* at 297-98.

¹²⁷2 Stat. 755 (1812).

forces of the United States¹²⁸ against the enemy nation.¹²⁹ These authorizations of force are all premised on congressional power to either authorize a partial limited war or a full war.

Particularly in the context of the debate in the Senate as to whether to authorize limited warfare against Britain in 1812, the best explanation for the language in all of these declarations of war directing the President to employ the entire military force of the United States is that the declaration of war did not automatically give the President unlimited power to use all the armed forces of the United States. Congress could limit the methods and means of warfare, and therefore determined to explicitly grant the President broad authority.

During the quasi-war with France, Congress also significantly narrowed the President's discretion to give orders to soldiers. The original laws for the regulation of the military had directed soldiers "to observe and obey the orders of the President of the United States."¹³⁰ In

¹²⁸See War Declared Between Germany and the United States, Pub. L. No. 331-77, 55 Stat. 796 (1941); Joint Resolution of June 5, 1942, ch. 325, 56 Stat. 307 (World War II: Rumania); Joint Resolution of June 5, 1942, ch. 324, 56 Stat. 308 (World War II: Hungary); Joint Resolution of June 5, 1942, ch. 323, 56 Stat. 307 (World War II: Bulgaria); Joint Resolution of Dec. 11, 1941, ch. 565, 55 Stat. 797 (World War II: Italy); Joint Resolution of Dec. 8, 1941, ch. 561, 55 Stat. 795 (World War II: Japan) (identical to German resolution except for identity of enemy); Joint Resolution of Dec. 7, 1917, ch. 1, 40 Stat. 429 (World War I: Austro-Hungary); Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1 (World War I: Germany); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (President "directed and empowered to use the entire land and naval forces of the United States"); Act of May 13, 1846, ch. 16, 9 Stat. 9.

¹²⁹Professors Goldsmith and Bradley note that all of the U.S. declarations of war expressly distinguish the declaration from the authorization to use force, and also point out that on no one has ever analyzed the significance of this distinction. Bradley & Goldsmith, *supra* note 123, at 2047, 2063-64. They suggest that one reason for this practice may stem from the fact that a declaration of war may not have served the function of providing congressional authorization for the President to use military force. Article I powers. *Id.* at 2064-66. Here I suggest a related reason: that Congress can limit the President's use of force even when it declares war, and that conversely, Congress wanted to make clear that it was authorizing and directing the President to employ the entire military force.

¹³⁰1 Stat. 95, 96 (1789).

1800, Congress amended the duty to obey commands to specifically prohibit soldiers from executing “unlawful orders” issued by superior officers.¹³¹ Congress could therefore presumably also use its power to make rules for the government and regulation of the armed forces to prohibit military officers from obeying and executing a specific order such to torture a prisoner, use waterboarding or any other technique deemed inhumane against a prisoner, or deploy a particular weapon to engage in any tactic or method of war Congress deems inappropriate.¹³²

Congress also extensively debated whether the President had sole power as Commander in Chief over at least some aspects of the conduct of the quasi-war with France. A number of Federalist members of Congress took the position that Congress could not restrict the President’s power to use naval vessels outside U.S. territorial waters or as convoys.¹³³ Congressman Harrison Gray Otis argued that

If a naval force was raised, it would rest with the President how it should be employed, as he was commander in chief. The Legislative could say whether the vessels should be employed offensively or defensively, but to say at what precise place they were to be stationed, was interfering with the duty of the commander in chief.¹³⁴

¹³¹2 Stat. 97 (1800), art. 14.

¹³²Indeed, during the Civil War, Congress amended the Article of War to prohibit any United States officer or soldier from “employing any of the forces under their commands for the purpose of returning fugitives from service or labor.” 12 Stat. 354, ch. XL, Mar. 13, 1862.

¹³³In June 1797 Republicans sought to limit the employment of U.S. naval vessels to “within the jurisdiction of the United States” and to prevent their use of a convoys outside United States waters. See 4 ANNALS OF CONGRESS 289, 294 (Albert Gallatin) (June 1797) (William B. Giles); *id.* at 368 (Mr. John Williams). See generally Sofaer, *supra* note 84, at 148-50 for a discussion of the Republican proposals and Federalist objections.

¹³⁴4 ANNALS OF CONGRESS 290.

Similarly Congressman Harper contended that Congress had no “right to direct the public force.”¹³⁵ If for example, “we were at war with Great Britain, [Congress] should have no right to say to the President, attack Canada or the Islands.”¹³⁶

The Republicans argued back that Congress had the power to limit and define the objects with which and upon which the naval vessels could be employed, and that in defining those objects Congress could dictate where the President could place the vessels and the uses he could make of them. For example, Congressman John Nichols argued that

When a force was raised for a particular object, he agreed that it was his [the President’s] business to direct the manner in which this force should be used; but to say he had the right to apply it as his discretion, was to make him master of the United States; if that were the case, he said, the powers of the House were gone He insisted upon it that they had a right to say the vessels should be kept in the river Delaware, if they pleased; the President might afterwards direct their conduct.¹³⁷

Republican leader Albert Gallatin distinguished between “the constitutional power of the President as Commander in Chief to command, and the legislative application of any force which may be raised by the United States.”¹³⁸ For Gallatin, there is

an essential distinction between the power to command and the application of a force. To command is *certainly subordinate to applying the force*. The President of the United States is Commander in Chief of the Militia of the United States; but when that Militia is raised, *it is to be applied in a manner specifically directed by law*.¹³⁹

¹³⁵*Id.* at 304.

¹³⁶*Id.*

¹³⁷*Id.* at 362.

¹³⁸*Id.* at 1456 (Apr. 1798).

¹³⁹*Id.* (emphasis added).

In Gallatin's view, then, the President's power to command was subordinate to congressional authority to determine how the force he commanded should be applied.

A number of prominent Federalists did not disagree with Gallatin's basic distinction. Both Otis and another Federalist, Samuel W. Dana agreed that Congress had "the 'right to define the object' of the naval vessels, but argued that it was not 'convenient' to do so."¹⁴⁰ Otis advanced a theory of concurrent power which was in some respects similar to that of Gallatin. "The President is Commander-in-Chief of the Army, and of the Militia when called out," he argued, "but Congress might, nevertheless direct the use of them."¹⁴¹ Otis believed that the President had the power to use the naval vessels as convoys in the absence of congressional direction, "yet it does not follow that the legislature shall not point out the particular manner in which they [the naval vessels] shall be employed and under what restrictions convoys shall or shall not be granted."¹⁴² Both Otis's and Gallatin's position would provide Congress substantial power to control the conduct of a war, including the manner in which naval vessels or armies would be deployed.

The House debate on the deployment of Naval vessels during the 1790s, while instructive of arguments made as to Congress's power to control the conduct of war, ended inconclusively. First, it was unclear whether members of Congress voted based on their constitutional positions, or whether they agreed with Congressman Otis, Dana and others that restrictions on the President's power might be lawful, but inexpedient. Second, the House itself acted seemingly inconsistently; it voted to reject Republicans' efforts to restrict the use of naval vessels to within

¹⁴⁰*Id.* at 365, 366.

¹⁴¹*Id.* at 1460.

¹⁴²*Id.*

the U.S. seacoast, and then essentially reversed its position the next day, adopting restrictions limiting the use of certain naval vessels to defending the seacoast and repelling any hostility to vessels and commerce within their jurisdiction.¹⁴³

In any event, two conclusions are clear from our experience during the first war with a European power after the adoption of the Constitution. First, on various occasions Congress regulated the President's conduct of the war, in some cases in great detail. Congress told the President which ships he could capture on the high seas,¹⁴⁴ limited his use of some ships to protecting commerce within our seacoast,¹⁴⁵ regulated in minute detail the personnel the President could deploy on each frigate of the United States,¹⁴⁶ "required" the President to "cause the most rigorous retaliation" on French citizens who mistreated captured American citizens,¹⁴⁷ enacted detailed regulations for the Navy proscribing the maltreatment or other abuse of any

¹⁴³See An Act Providing Naval Armament, 5th Cong., 1st Sess. Ch. 7, I U.S. Statutes at Large, 523, 527 (July 1, 1797); 4 ANNALS OF CONGRESS 370 (Congressman Sitgreaves) ("He was at a loss to account for the change of sentiment in the House since yesterday. He thought it was then the opinion that they ought to provide the force, and when provided, leave it to the disposal of the Executive, and that if he thought proper to employ the frigates in the protection of our commerce beyond the jurisdiction line, he should be authorized to do so."); Sofaer, *supra* note 84, at 148. In addition, the House voted at times to restrict the vessels use as convoys, but the Senate refused to concur, resulting in a compromise bill without the restriction. Sofaer, *supra* note 84, at 150.

¹⁴⁴Little v. Barreme, 6 U.S. 170 (1804).

¹⁴⁵1 Stat. 523, 525.

¹⁴⁶*Id.* at 524 (that "these shall be employed on requiring board each of the ships of forty-four guns, one captain, four Lieutenants, two Lieutenants of Marines, one chaplain, one surgeon, and two surgeon's mates . . ."); Sec. 2.

¹⁴⁷An Act Vesting the Power of retaliation, in certain cases, in the President of the United States, 5th Cong., Sess. II, Ch. 45, I Statutes at Large, 743 (Mar. 3, 1799).

civilian while on shore;¹⁴⁸ provided detailed instructions for the detainment of prisoners captured on board French vessels;¹⁴⁹ and authorized the President with power to grant special, limited commissions to the owners of private armed ships of the United States to capture certain armed French vessels.¹⁵⁰ Secondly, the Supreme Court clearly affirmed Congress's power to restrict the President's conduct of warfare. As Abraham Sofaer points out, "the Supreme Court made clear that it regarded Congress as the ultimate source of authority on whether and *how* the nation would make war. Both branches could act . . . but Congress had the final say."¹⁵¹

C. Civil War

The Civil War revived questions of congressional power over the conduct of warfare. At the outset of the war, frustrated with the delay of military action against the confederate army in Virginia, Republican Senator Trumbull pressed in a Senatorial caucus a resolution directing an immediate movement of troops towards Richmond before July 20, 1861.¹⁵² Reportedly backed by a group of fifteen Senators, but rejected in the caucus, President Lincoln was told that unless action was taken promptly, the resolution would eventually be forced through.¹⁵³ Shortly

¹⁴⁸An Act for the better government of the Navy of the United States, 6th Cong., Sess. 1, Ch. 33, Act 27, I Statutes at Large, 45 (Apr. 23, 1800).

¹⁴⁹An Act to Further Protect the Commerce of the United States, 5th Cong., 2d Sess., Ch. 68, *id.* at pp. 578, 580, § 8.

¹⁵⁰*Id.* at § 2.

¹⁵¹Sofaer, *supra* note 84, at 166 (emphasis added).

¹⁵²A. HOWARD MENEELY, THE WAR DEPARTMENT, 1861, A STUDY IN MOBILIZATION AND ADMINISTRATION 1867 (1928).

¹⁵³*Id.*

thereafter, the Army under General McDowell did launch a campaign toward Richmond, which made Trumbull's effort moot and resulted in the defeat at the first Battle of Bull Run.

The Radical Republicans dissatisfaction with the conduct of the Northern war effort led them to establish the Joint Committee on the Conduct of the War.¹⁵⁴ That committee was accused of intermeddling in military affairs, and General Robert E. Lee is reported to have remarked that the committee's efforts were worth two Army divisions to the Confederacy.¹⁵⁵ Despite these accusations, the committee took no legislative action to interfere with military campaigns, confining its work primarily to investigations of military corruption, negligence and disastrous military decisions, which were well within congressional power.¹⁵⁶ While the committee and various members of Congress sought to pressure Lincoln and the northern generals on military matters, Lincoln skillfully parried their pressure, compromising when necessary, but avoiding open confrontation.

The most extensive debate in Congress over the respective war powers of the President and Congress came over legislation "to confiscate the property and free the slaves of rebels," known as the Second Confiscation Act.¹⁵⁷ Introduced by Senator Trumbull in January 1862, the original bill provided for the forfeit of real and personal property of rebels who either were in the Confederate armies or provided "aid and comfort" to the rebellion; declared the slaves of such individuals to be free; and instructed the President to use the military to confiscate property in

¹⁵⁴See generally BRUCE TAP, *OVER LINCOLN'S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR* (1998).

¹⁵⁵DAVID MCCULLOUGH, *TRUMAN* 258 (1992).

¹⁵⁶TAP, *supra* note 154, at 2-9 pointing out that the Committee gained notoriety for its wide ranging investigations.

¹⁵⁷Act of July 17, 1862, Chapter 195, 12 Stat. 589.

districts that were “beyond the reach of civil process” because of the rebellion, when he believed that military necessity or the safety, interest and welfare of the United States required.¹⁵⁸ At the time Trumbull introduced his bill, Lincoln’s policy was not in favor of immediately emancipating slaves or confiscating rebel property, and in fact he revoked orders by Army generals such as General Hunter that purported to free slaves.¹⁵⁹

Some conservative Republican and Democratic Senators opposed to widespread confiscation and emancipation raised strong constitutional objections to the proposed legislation, including the argument that it improperly interfered with the President’s prerogatives as Commander in Chief. They contended that the President, not Congress, possessed the power to order confiscation as he deemed militarily necessary.¹⁶⁰ Senator Cowan argued that the act was unconstitutional because, *inter alia*, the Constitution declares that the President is Commander in Chief of the Army and Navy, “investing him with the war-making power,” and “[h]e is the commander directing and controlling it as he please, and only restrained in so far by Congress in that he must depend upon them to foot his bills and authorize his levies.”¹⁶¹ Senator Browning claimed that “the war-executing powers are vested in the President, in the executive department of the Government, and Congress has no more right to touch them or exercise them than it has to usurp and exercise the judicial functions of the government. . . .”¹⁶² “Congress can no more

¹⁵⁸S. 151 Congressional Globe, 37th Cong., 2d Sess., 334, 942.

¹⁵⁹SILVANA R. SIDDALI, *FROM PROPERTY TO PERSON, SLAVERY AND THE CONFISCATION ACTS, 1861-1862*, at 99-108, 182-83 (2005).

¹⁶⁰*See generally* ALLAN G. BOGUE, *THE EARNEST MEN, REPUBLICANS OF THE CIVIL WAR SENATE 221, 224-25* (1981); SIDDALI, *supra* note 159, at 120-66.

¹⁶¹Cong. Globe, 37th Cong., 2d Sess., 1052.

¹⁶²*Id.* at 1136, 1137.

command the Army, or interfere with the command of it when in the field, than it can adjudicate a case at law or control the decisions of a court.”¹⁶³

Opponents of the bill articulated several broad principles to support Congress’s lack of power over the conduct of war. The first was that the conduct of war was governed by international law—the laws of war—and that those laws of war were to be executed by the President and not Congress. This position viewed the Constitution as granting the President the right and privilege to conduct war once Congress authorized hostilities—guided only by the common laws of war, which could not be violated, modified or supplemented by statute. Senator Browning and other Senators argued that the law of nations provided all of the rules governing the types of enemy property subject to confiscation. The only question left unresolved was the manner of execution of those laws—a task performed by the President as Commander in Chief, not Congress.¹⁶⁴ Browning read the Constitution to permit Congress or the President to take only actions prosecuting the war that were in conformity with the law of nations.¹⁶⁵ Moreover, under the law of nations “[a]ll conceivable emergencies are provided for. We need not legislate to meet them. It is only necessary that the laws shall be executed.”¹⁶⁶

¹⁶³*Id.* at 1136.

¹⁶⁴*Id.* at 1857.

¹⁶⁵*Id.* To Browning and other opponents, captures on land and sea were “not subject to the control of municipal laws, unless such principal laws conform to the laws of nations, and then they are of force only because of such conformity.”

¹⁶⁶*Id.* Senator Cowan argued that, “In the conduct of the civil war now waged in this country, the President is guided and controlled by these laws, nor has Congress any power whatever to alter or change them, and bind him by so doing, against his consent.” *Id.* at 1052. See also Senator Henderson’s arguments to same effect. *Id.* at 1573.

Browning and other Senators were correct that the framers of the Constitution understood international law to be binding on Congress in the same way that the Constitution was and believed Congress without constitutional power to alter or contravene those laws.¹⁶⁷ Nonetheless, the opposition's war powers theory according the President sole power to implement and execute international law was subject to several obvious difficulties. Their theory essentially rendered superfluous many congressional war powers, especially the power to make rules concerning captures on land and water. For, according to the opposition, all the rules concerning such captures were already contained in the laws of war and required Executive, not congressional execution.¹⁶⁸

More fundamentally, the opposition's law of nations theory ignored the problem that wide swaths of warfare were either totally unregulated by the laws of war, or regulated by vague rules, or left to the discretion of each nation. In particular, the Supreme Court had already pointed out in *Brown v. United States* that the power to confiscate enemy alien property was not mandatory under the laws of nations but rather was left to the discretion of each nation.¹⁶⁹ Under

¹⁶⁷Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1084 (1985). Indeed, Lincoln's Attorney General explicitly affirmed that constitutional principle, as did several Justices of the Supreme Court in the aftermath of the Civil War. *Id.* at 1108-10. By the twentieth century Congress's power to enact legislation in violation of international law became well established, at least with respect to non-fundamental norms of international law. See *Committee of U.S. Citizens v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).

¹⁶⁸Senator Henderson claimed that Congress could enact procedural rules for the condemnation of property, but cannot determine what is or what is not the subject of capture." *Id.* at 1573. But there seems no reason to distinguish between congressional power to determine the property subject to be captured and the process used to effectuate its condemnation as lawful prize of war.

¹⁶⁹*Brown v. United States*, 8 Cranch 110, 128-29 (U.S. 1814).

our Constitution, that discretion was to be exercised by Congress.¹⁷⁰ In general, international law not only prohibited certain conduct but also gave each nation certain rights, and Congress could decide whether to exercise those rights or not. Finally, when international law was vague—which was not infrequent—Congress was given the power not only to punish offenses against the law of nations, but also to *define* such offenses.¹⁷¹

In response to this problem, conservative Senators articulated a second related theory justifying absolute Presidential power over the conduct of war. To the extent that the laws of war were discretionary, they argued that their application depended on judgments as to the military necessity of a particular measure such as the capture of enemy property. But according to these Senators, the judgment of military necessity was, by its nature, an Executive rather than a legislative function.¹⁷² As Senator Collamer argued, “I insist that the Executive, his general, the military power, are the sole judges of what is military necessity.”¹⁷³ What this argument ignored was that there are many decisions that involve determinations of military necessity explicitly given to Congress: whether to raise an army or navy for the nation’s defense; how many soldiers and sailors to provide; whether to authorize private persons to conduct hostilities; and more particularly what enemy property should be confiscated.

The opposition also attempted to analogize the President’s powers to those of the English king. Senator Cowan argued that congressional power was “precisely the power which the English Parliament has over the English army in the field, and no more, and the President, in the

¹⁷⁰*Id.*

¹⁷¹U.S. CONST. art. I, § 8.

¹⁷²*See* Cong. Globe, 37th Cong. 2d Sess. at 1858.

¹⁷³*Id.* at 1810.

command of the Army, and in directing its operations, is in my humble judgment, just as supreme and as independent of any direction from Congress, or the judiciary or anybody else, as the King of Great Britain is in the command of the armies of Great Britain.”¹⁷⁴ Here Cowan was simply in error; as Hamilton had pointed out in the Federalist papers, the President was not given the same power over warfare as the King of Great Britain.¹⁷⁵

Finally, the opponents of the Confiscation Bill fell back on the same analogical reasoning that Bush Administration officials have employed: that the power to deploy troops on the battlefield leads to the logical conclusion that the entire conduct of the war is within the President’s sole power. As Senator Browning put it “Has Congress anything whatever to do with it? [Confiscation] Just as well might Congress claim the right to tell the general on the field of battle when to advance and when to withdraw a column, and when the bayonet should be substituted for the musket and the rifle. These are not legislative functions, but executive. So is the seizure and confiscation of the property of a public enemy on land in time of war executive. It is not the *making*, but the *executing* of a law.”¹⁷⁶

Radical proponents of the bill as well as moderate Republicans who supported compromise, argued forcefully that Congress had virtually absolute power to control the conduct of the war and that the President’s power was merely to act in the absence of legislation. Senator Trumbull argued that “there is not a syllable in the Constitution conferring on the President war powers. . . . As Commander in Chief when an army is raised, in the absence of any rules adopted by Congress for its government, he would have the right to control it, in the prosecution of the

¹⁷⁴*Id.* at 1879.

¹⁷⁵Hamilton, FEDERALIST NO. 74, *supra* note 70.

¹⁷⁶*Id.* at 1858.

war, according to his discretion, not violating the established rules of civilized warfare.”¹⁷⁷ For Trumbull, “when armies and navies are raised by Congress, of which the President is, by the Constitution, made Commander in Chief he can only govern and regulate them as Congress shall direct”¹⁷⁸ Senator Morrill similarly claimed, that there is “no limit on the power of Congress; but it is invested with the absolute powers of war,” “the whole power of war,” an “*unrestricted power*.”¹⁷⁹ Senator Sumner responded to Browning that “there is not one of the rights of war that Congress may not exercise; there is not a weapon in its terrible arsenal that Congress may not grasp.”¹⁸⁰ Senator Howard was even more explicit that Congress had complete control over the conduct of warfare with the exception that it cannot supersede the President in the chief command:

For if it be the exclusive right of Congress not only to raise and support armies and navies, but (which is an irresistible and immediate inference) to use and employ them for warlike purposes, they must possess also the power to control every movement of the Army and Navy in actual service, whenever they shall see fit so to do. They cannot indeed supersede the President in the chief command, but they possess the undoubted power under the Constitution to subject him to their own orders as to the objects of the war, its extent and duration, the contingencies upon which it shall ease or be resumed, the means of annoyance or defense that may be employed, and, in short, the entire use which he shall make of the military forces of the country.¹⁸¹

¹⁷⁷*Id.* at 1559.

¹⁷⁸*Id.*

¹⁷⁹*Id.* at 1076 (emphasis in original). *See also id.* at 1875 (Senator Wilmot).

¹⁸⁰*Id.* at 2918.

¹⁸¹*Id.* at 1718. Senator Hale admitted that there were some express powers of the President, such as the pardon power with which Congress could not interfere, but rejected the notion that the Commander in Chief power was one of them. 2928.

Moderate Republicans generally agreed with the Trumbull Morill, Sumner and Howard. Senator Sherman, a moderate Republican who introduced an amendment to Trumbull's bill to narrow its scope did not agree with the opposition's view of war powers. For him, the President could conduct the war "only in the manner and mode we may proscribe by law."¹⁸² "Congress has the power to make rules and regulations governing war, and the President has no power except simply, as Commander in Chief of the Army and Navy, to execute those laws."¹⁸³ And some members of Congress, such as Representative Blair, argued that congressional power over emancipation or confiscation did not stem primarily from the capture clause but was an "incident of the general war power of Congress."¹⁸⁴

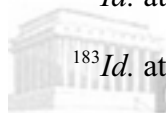
Senator Wade answered Browning and Cowan's argument that Congress could not interfere with the President's command of battlefield operations, arguing that although it would be foolish for Congress to interfere with the President's power to command in the field, Congress nonetheless had the constitutional authority to do so.

Undoubtedly and unquestionably Congress is not going to interfere with the command of a general in the field before the enemy; they are not going to say to him, you shall march such a brigade to such a place, and you shall countermarch another, and you shall advance and retreat, and you shall intrench, and you shall pull down your intrenchments, you shall assail the enemy to-morrow, and you shall retreat from him the next day. *I do not doubt that Congress, if they were foolish enough, have power even to regulate that; but it would be as foolish as anything could be to attempt such an interference with a general, a commander-in-chief in the field.* Nobody contemplates any such thing; but we may lay down the principles on which the war shall be prosecuted; we may enact a

¹⁸²*Id.* at 1784.

¹⁸³*Id.* at 1784.

¹⁸⁴*Id.* at 2300.



law to-day, if we will, declaring, that the Army shall take no prisoners. Of course the greater includes the less.¹⁸⁵

In the end, the argument that Congress had the war power to provide for the confiscation of Confederate property carried the day. Large majorities in the Senate and House of Representatives voted for the Second Confiscation Act, enacted on July 17, 1862.¹⁸⁶ While due process and other constitutional and political objections forced Trumball and the other radicals to accept a compromise version of the bill which watered down some of the most forceful provisions in Trumball's original bill, the legislation still imposed duties on the President that Cowan, Browning and others had argued were inconsistent with his power as Commander in Chief. For example, Section 5 required the President "to cause the seizure of all the estate and property, money, stocks, credit and effects" of certain classes of Confederate leaders, while Section 6 required that within 60 days after a public proclamation by the President warning all persons to cease to aid and abet rebellion, it would be "the duty of the President" to seize property of rebels who did not comply. Section 7 required the army to free all fugitive slaves of rebels who took refuge within the lines of the army and all slaves of rebels captured by the army.¹⁸⁷

¹⁸⁵*Id.* at 2930 (emphasis added).

¹⁸⁶12 Stat. 589. The vote on the final bill was 28-13 in the Senate and 82 to 92 in the House. In the Senate, even some who had argued that Congress had no power to pass legislation in this whole area voted for the bill, such as Senators Cowan and Collamer.

¹⁸⁷SIDDALI, *supra* note 159, at 91. Indeed, Lincoln threatened to veto the bill unless Congress made clear that the Act would not "work a forfeiture of the real estate of offenders beyond their natural lives," which Congress did. Cong. Globe 3374; BOGUE, *supra* note 160, at 234.

The bill was forced upon a reluctant President, who had wanted Congress to wait until he recommended these measures.¹⁸⁸ According to Congressman James G. Blaine, Lincoln did not object to the legislation in principle, but thought it was ill-timed and premature, and signed the law reluctantly. Indeed, the bill's opponents' challenged Congress's constitutional power to provide for confiscation, in part because they recognize that Lincoln was hesitant to interfere with the rebels' property rights.¹⁸⁹ Lincoln promulgated the proclamation required by the statute but never vigorously enforced the statute and by the end of the war less than \$2 million in property had been confiscated from the rebels.¹⁹⁰ But the principle that Congress could decide whether the government should use confiscation of enemy property as a tactic of warfare had been clearly established.¹⁹¹

After the Civil War ended, the Supreme Court upheld the constitutionality of the Confiscation Act, employing broad language that mirrored the Republican arguments that

¹⁸⁸JAMES G. BLAINE, *TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD*, vol. I, 343 (1886).

¹⁸⁹SIDDALI, *supra* note 159, at 138.

¹⁹⁰SIDDALI, *supra* note 159, at 238-39. While the courts handled a considerable number of confiscation cases handled by the courts under the statute, very little property was actually confiscated under the Act. JAMES GARFIELD RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN*, 288-91 (1926). In large part this was due to the compromise nature of the statute, its lack of a strong enforcement mechanism and Lincoln's reluctance to strongly enforce it. SIDDALI, *supra* note 159, at 245-47.

¹⁹¹War Department Solicitor William Whiting affirmed congressional power to order emancipation and confiscation in an important study published late in early 1863. WILLIAM WHITING, *WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON AND SLAVERY* (1863). Whiting took the position that the President and Congress had concurrent power over emancipation and confiscation, writing that "the military authority of the President is not incompatible with the peace or war powers of Congress; *but both co-exist, and may be exercised upon the same subject.*"

accorded Congress virtually unlimited power to control the conduct of war.¹⁹² The Court held that the congressional “power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.”¹⁹³ The Court therefore agreed with those members of Congress who located congressional power to seize and confiscate the property of an enemy within the general power to declare war. Moreover, the Court claimed that “[I]f there were any uncertainty respecting the existence of such a right it would be set at rest by their express grant of power to make rules respecting captures on land and water.”¹⁹⁴

D. Twentieth Century

Twentieth century Congresses continued to exercise their authority to limit the President’s conduct of authorized hostilities. Congress has regulated in minute detail the manner in which armed forces may be deployed, enacted detailed rules governing the conduct of those forces, and set forth rules of engagement, authorized the President to conduct hostilities limited in geographic scope, time, the type and number of forces that could be used, and the objects and purposes for which force could be used.

For example, in 1908, Congress enacted a statute barring any expenditure the Marine Corps could be expended unless Marine Corps officers and enlisted men constituted at least 8% of the enlisted men on board all battleships and armed cruisers.¹⁹⁵ The statute overruled a decision by President Theodore Roosevelt to station marines on shore and not aboard naval ships. The Navy apparently had doubts as to the constitutionality of the statute and requested an

¹⁹²Miller v. United States, 78 U.S. 268 (1871).

¹⁹³78 U.S. at 305.

¹⁹⁴*Id.*

¹⁹⁵35 Stat. 753, 773 (1909).

opinion from the Attorney General, George W. Wickersham.¹⁹⁶ Wickersham had “no doubt” as to the constitutionality of the statute.¹⁹⁷ For “Congress is the sole judge of how the Army or Navy shall be raised and of what it shall be composed.”¹⁹⁸ Therefore Congress could constitutionally require that no funds shall be available for the Marine Corps, “unless the Marine Corps be employed in some designated way,” and the President was bound to comply.¹⁹⁹

In 1913 Attorney General James McReynolds opined that a Navy regulation permitting staff officers of the Marine Corps to be detached from headquarters and given other duties was unlawful because it contravened the relevant statutes.²⁰⁰ These statutes could be said to micromanage the armed forces in the same way as early statutes already discussed required specific number of officers and sailors to be deployed on different types of naval vessels.²⁰¹ Yet this legislation clearly fell within congressional power to decide the composition of the armed forces and to enact rules for their deployment.

More importantly, Congress has authorized the President to use force numerous times since World War II subject to limitations on scope, time period, types of force and geographic area. In 1955, Congress authorized the President to use force against China but limited that authorization only to “securing and protecting Formosa and the Pescadores against armed

¹⁹⁶27 Op. Atty. Gen. 259 (1909).

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 260.

¹⁹⁹*Id.*

²⁰⁰30 Op. Atty. Gen. 234 (1913). *See also* WORMUTH & FIRMAGE, *supra* note 72, at 96.

²⁰¹See page ___ *supra* & fn. ____.

attack.”²⁰² While the Gulf of Tonkin Resolution of 1964 provided the President broad authority to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” in Southeast Asia,²⁰³ Congress subsequently limited the President’s power to use American forces to fight the war in Indochina. In response to the escalating ground war in Indochina, Congress provided in the Department of the Defense Appropriation Act of 1970 that “none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand.”²⁰⁴ That prohibition was prefaced by the statement that the restriction was “[I]n line with the expressed intention of the President of the United States.” Then Assistant Attorney General William H. Rehnquist wrote that “the provision was accepted by the Executive.”²⁰⁵ Rehnquist’s memorandum, written when he was in charge of the Justice Department’s Office of Legal Counsel, supports congressional power to limit the scope of the President’s power to conduct hostilities. He argued that the notion that Congress “may not delegate a lesser amount of authority to conduct military operations” than that provided by unlimited declared war “is both utterly illogical and unsupported by precedent.”²⁰⁶ He recognized that “Congress undoubtedly has the power in certain situations to restrict the President’s power as Commander-in-Chief to a

²⁰²Joint Resolution of Jan. 29, 1955, Pub. L. No. 4, 69 Stat. 7, cited in Bradley & Goldsmith, *supra* note 123, at 2047, 2076-77.

²⁰³Pub. L. 88-408, 78 Stat. 384 (1964).

²⁰⁴Pub. L. 91-171, § 643, 83 Stat. 469, 487 (1969). This prohibition was continued in subsequent appropriation acts. *See, e.g.*, Pub. L. 92-204, § 742, 85 Stat. 716, 735 (appropriation act for 1972).

²⁰⁵Rehnquist, *supra* note 44; 83 Stat. 469, 487 (1969).

²⁰⁶*Id.* at 18.

narrower scope than it would have had in the absence of legislation.”²⁰⁷ Rehnquist strongly suggested that congressional power to control the conduct of war has constitutional limits, . . . particularly “should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander-in-Chief of the Armed forces.”²⁰⁸ However, he neither attempted to draw a clear line between congressional and presidential authority, nor did he explicitly claim that any such restrictions would be clearly unconstitutional, but merely that they would not be free of constitutional doubt.

After United States ground forces entered Cambodia in 1970, Congress debated and eventually enacted legislation providing that “none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.”²⁰⁹ The President apparently accepted the constitutionality of the restriction of his power to use ground forces in Cambodia.²¹⁰

The Cambodian restriction was preceded by a lengthy seven week debate in the Senate over the Cooper-Church Amendment, which would have prohibited retaining United States forces in Cambodia at a time when the President still was deploying them there, and would have

²⁰⁷*Id.* at 20.

²⁰⁸*Id.* at 21.

²⁰⁹Pub. L. 91-652, § 7a, 84 Stat. 1942, 1943 (1971).

²¹⁰Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 495 (1971). As with the restriction on the use of ground troops in Thailand and Laos, the Cambodian restriction was prefaced with the phrase “In line with the expressed intention of the President of the United States,” suggesting that the President was not planning to reintroduce U.S. troops into Cambodia, and had no constitutional objections to the Amendment. Raven-Hansen & Banks, *supra* note 44, at 912.

also prohibited air operations over Cambodia in support of Cambodian forces.²¹¹ A notable aspect of the debate is that the opposition to the Cooper-Church Amendment on Constitutional grounds generally did not rely on the broad Executive Commander in Chief power to direct the conduct of the war, but on the President's power as Commander in Chief to protect the lives of American troops subject to attack or imminent attack, a power seemingly derived from the President's power to repel attacks on American territory and armed forces,²¹² Senator Byrd successfully introduced language that stated that nothing in the bill was to be deemed to impugn the constitutional power of the President to take action "which may be necessary to protect the lives of U.S. armed forces wherever deployed."²¹³ The Cooper-Church amendment was adopted by the Senate, but failed passage in the House and was not therefore enacted into law.²¹⁴

Congress eventually terminated the Indochina war by cutting off all funding for the President to continue military operations in Indochina. In 1973, Congress provided that

²¹¹See text of bill in S. REP. NO. 91-865, 91st Cong., 2d Sess. 3-4 (1970).

²¹²*See, e.g.*, 116 CONG. REC. 15560, 15561 (May 14, 1970) remarks of Senator Dole. *Id.* at June 16, 1970, remarks of Senator Byrd, President's power to respond to imminent danger or emergency situation without time to consult. *See generally* Mikva & Lundy, *supra* note 210, at 487-95.

²¹³The final text of the Cooper-Church Amendment is reproduced in the Senate's War Powers, Debate on Cambodia from the Congressional Research 239 (Eugene P. Dvorin ed., 1970). Also included in the Cooper-Church Amendment as it was eventually voted on was a proviso that nothing contained in the bill shall be deemed to impugn the constitutional power of the Congress including the power to declare war and to make rules for the government and regulation of the armed forces of the United States. *Id.* Some felt that acceptance of the proviso protecting the constitutional power of the President "gutted the entire effort." Mikva & Lundy, *supra* note 210, at 491.

²¹⁴See ROBERT DAVID JOHNSON, CONGRESS AND THE COLD WAR 164-68 (2006). Before a compromise was negotiated by the Majority Leader, the Senate had rejected an amendment offered by Senator Byrd which would have denied that Cooper-Church would preclude the President from taking all actions necessary to protect U.S. troops in South Vietnam. *Id.* at 166.

“Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.”²¹⁵

In later years, Congress also limited Executive power to conduct duly authorized warfare. Congress authorized the President in 1983 to continue participation by United States armed forces in the Multinational Force in Lebanon but limited the time period of such authorization to eighteen months.²¹⁶ In addition, the President’s use of armed force in Lebanon was limited to the performance of the functions specified in and subject to the constraints imposed by the agreement establishing the Multinational Force in Lebanon, except that the President could take protective measures necessary for the safety of that force.²¹⁷ Three main limitations on the U.S. role were set forth in that agreement: the number of U.S. troops would be approximately 1,200, they would operate only in the Beirut area, and they were not expected to perform a combat mission except to exercise the right of self-defense.²¹⁸

²¹⁵P.L. 93-52 § 108, 87 Stat. 130, 134 (1973).

²¹⁶Pub. L. 98-119, § 6, 97 Stat. 805, 807 (1983).

²¹⁷*Id.* § 3, 97 Stat. 805 at 806.

²¹⁸S. REP. NO. 242, 98th Cong. 1st Sess. 23, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS 1230, 1240, 1248-49. In signing the legislation, President Reagan claimed that while it was his intention to consult with Congress, he did not consider himself bound to follow congressional directives that limited his war powers, including the 60-day limit of the War Powers Resolution. Statement on Signing S.J. Res. 159 into law, 19 Weekly Comp. Pres. Doc. 1422-23 (Oct. 17, 1983). However, in a letter to House Speaker Thomas P. O’Neill, Reagan said that it was his “intention to seek congressional authorization—as contemplated by the Act—if circumstances require any substantial expansion in the number *or role* of U.S. armed forces in Lebanon.” Letter to Congressional Leaders on the Compromise Resolution on War Powers, 19 Weekly Comp. Pres. Doc. 1342 (Oct. 3, 1983) (emphasis added). *See generally* Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1423-27 (1984) for the

In 1980, the Justice Department's Office of Legal Counsel affirmed congressional power to place time limits on the President's use of troops to conduct hostilities.²¹⁹ Assistant Attorney General Harmon wrote that the sixty day limit on the use of U.S. armed forces by the President was constitutional. For Harmon, "the practical effect of the sixty day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad."²²⁰ That burden did not unconstitutionally intrude upon the President's Executive powers. Perhaps even more importantly, Harmon recognized that "Congress may regulate the President's exercise of his inherent powers by imposing limits by *statute*."²²¹ This position is consistent with both Rehnquist's memorandum and Chief Justice Marshall's opinion in *Little* that legislation may limit power the President may have as Commander in Chief.

Similarly, in 1993 Congress authorized President Clinton to use United States armed forces in Somalia subject to both time limitations and severe restrictions on their use.²²² Congress approved the use of U.S. armed forces only for the purpose of protecting United States personnel and bases and securing the free flow of supplies and relief operations in Somalia.²²³

background of the Lebanon resolution.

²¹⁹40 Opinion of Office of Legal Counsel 185, 196 (Feb. 12, 1980).

²²⁰*Id.*

²²¹*Id.* (emphasis in original). Harmon claimed that the War Powers Resolution's use of the legislative veto by concurrent resolution of both houses was unconstitutional, but that Congress could regulate the President's inherent powers by means of a duly enacted statute.

²²²Department of Defense Appropriation Act 1994 Pub. Law 103-139 § ___, 107 Stat. 1418, 1476 (1993).

²²³107 Stat. at 1476.

Moreover, Congress provided a time limit for the President's use of troops until March 31, 1994 after which the President was obligated to return to Congress for further authorization.²²⁴

As already noted, Congress limited the purpose, object and uses of United States armed forces in authorizing the President to take action against Iraq in 1991. Rather than authorizing unlimited warfare against Iraq, Congress permitted the President to use United States forces only for the purpose of implementing various Security Council resolutions, thereby precluding certain military tactics and strategies, including those that would have resulted in a military campaign against Baghdad to oust Saddam Hussein.²²⁵

The debate on whether Congress would authorize President Clinton's air campaign against Yugoslavia in 1999 is also instructive as to congressional power to impinge upon the Commander in Chief's choice of military tactics. Clinton had initiated a bombing campaign in conjunction with NATO forces against Serbia in response to Serbian human rights violations in Kosovo without first obtaining congressional authorization. The Senate relatively quickly voted to authorize the President to conduct limited military operations: "military *air* operations and *missile strikes* in cooperation with our NATO allies against the Federal Republic of Yugoslavia."²²⁶ When the House of Representatives debated the Senate Resolution more than a month later, many Congressmen believed that they should explicitly deny the President the power to use ground forces in the Yugoslav conflict. Congressmen Fowler and Goodling

²²⁴*Id.* Congress also limited the President's power to determine who should command U.S. forces on the ground providing that those forces "shall be under the command and control of United States commanders and not U.N. commanders. *Id.*

²²⁵Authorization of the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 With Respect to Iraq, P.L. 102-1, 105 Stat. 3 (1991). See pages ____ - ____ and fns. ____ - ____, *supra*.

²²⁶S. CON. RES. 21, *reprinted in* 145 CONG. REC. 2376 (Apr. 28, 1999) (emphasis added).

introduced a resolution to prohibit the use of appropriated funds for the deployment of ground elements of the United States armed forces in the Federal Republic of Yugoslavia unless that deployment is specifically authorized by law.²²⁷ The House debated a series of resolutions at the same time, including one to declare war, the Senate resolution authorizing the limited warfare and the resolution prohibiting the use of ground forces.

Virtually every member of Congress who participated in the debate recognized that Congress had the constitutional authority to limit the use of ground troops even if they authorized the President to conduct warfare.²²⁸ Only a few representatives disputed the constitutionality of the resolution even though it could have been read to prevent U.S. commanders from pre-positioning tanks and military equipment, prohibit on the ground intelligence gathering and the use of special forces, and impair commanders' ability to gather intelligence necessary to prosecute the air war and obtain other critical military information.²²⁹ Despite a few members' concerns that the resolution interfered with the President's commander-in-chief power by getting "into the details of whether you can do this mission but you can't do that mission,"²³⁰ the majority of the House voted 249-180 to approve the prohibition on the use of ground elements in

²²⁷H.R. 1569, *reprinted in* 145 CONG. REC. 2376 (Apr. 28, 1999).

²²⁸145 CONG. REC. 2398 (remarks of Mr. Kolbe that he would vote to authorize limited war, but prohibit the use of ground troops. *Id.* (remark of Mr. Castle to same effect); *id.* at 2390 (remarks of Mr. Markey); *id.* at 2404 (remarks of Mr. Andrews, recognizing that Congress has the constitutional power to tell the President not to use ground troops, but that it is wrong to do so); *id.* at 2408 (remarks of Mr. Spratt, same).

²²⁹145 CONG. REC. 2394 (remarks of Mr. Benstein setting forth limitation imposed by bill); 145 CONG. REC. 2388 (remarks of Mr. Spratt) (same) 2409 (remarks of Mr. Skelton) (same).

²³⁰*Id.* at 2443 (remarks of Mr. Sisisky); *id.* at 2402 (remarks of Mr. King).

the military campaign.²³¹ While the Senate Resolution was ultimately defeated in the House by a tie vote of 213-213, and therefore neither that resolution nor the resolution prohibiting the introduction of ground elements ever became law, Congress overwhelmingly agreed that it had the authority to limit the manner and means by which the President can conduct ongoing military campaigns.

Congress also can and has enacted statutes implementing various laws of war treaties which regulated the tactics the President can deploy on the battlefield.²³² For example, the War Crimes Act prohibits and makes criminal grave breaches of the Geneva Convention as well as various articles of the Annex to the Hague Convention IV; Respecting the Laws and Customs of War on Land of 1807.²³³ The Act prohibits and criminalizes any attack of towns, villages, dwellings or buildings which are undefended, the use of weapons calculated to cause unnecessary suffering, the destruction or seizure of enemy property unless such destruction is imperatively demanded by the necessities of war, and requires the Executive to take all necessary steps to spare buildings dedicated to religious and certain other civilian uses in any siege or bombardment. In addition, the statute prohibits the military from using weapons such as mines and booby traps in a manner contrary to Protocol on Mines, Booby Traps and Other Devices to kill or seriously injure civilians when the United States ratifies that treaty.²³⁴ In short, Congress has exercised the power to implement treaties governing the rules of war and to define offenses

²³¹*Id.* at 2413. Many members of Congress who voted to authorize limited war also voted for the resolution prohibiting the introduction of ground troops.

²³²War Crimes Act, Pub. L. 104-92, § 2a (1996); 18 U.S.C. § 2441.

²³³2441(c)(2), arts. 23, 25, 27, 28; Convention (IV) Respecting the Laws and Customs of War on Land with Annexed Regulations, Oct. 18, 1907, 36 Stat. 227.

²³⁴*Id.* at 2441(c)(4).

against the law of nations, which has and could in the future restrict military commanders' discretion to conduct warfare.²³⁵

In sum, recent history confirms the lessons set forth by the early leaders of the Republic. As the Supreme Court recognized early on, Congress can control the President's conduct of war by limiting his authorization "in place, objects and in time." Congress has done so throughout our history.

III. Concurrent Power Over the Conduct of War

The history of congressional restrictions on the President's Commander in Chief power to fight wars confirms that the Constitution grants Congress substantial power to decide not only whether to initiate warfare but how and in what manner those authorized wars should be fought. But the President was also accorded substantial authority over the conduct of warfare. Certain powers were designed to be exclusive. Only Congress could authorize and initiate warfare, with the sole exception that the President could use force to respond to sudden attacks. Only Congress could appropriate monies for the armed forces. The President was given the exclusive power to command the armies. But for the most part, Congress and the President were given concurrent powers over the conduct of warfare.

²³⁵Professor John Yoo argues that the "treatment of captured enemy soldiers is an area in which the President enjoys exclusive authority," yet dismisses the statutes that Congress has enacted regulating the treatment of enemy soldiers throughout American history. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201 (2004). He discusses statutes criminalizing torture of enemy prisoners and nowhere disputes their constitutionality, although he fails to recognize that such statutes clearly regulate "the treatment of captured enemy soldiers," and therefore under Yoo's analysis should be unconstitutional as an infringement of the President's exclusive authority over the treatment of captured enemy soldiers. *Id.* at 1232-33. He claims that the congressional power to "make rules for the government and regulation of the land and naval forces" is likely limited to the discipline of U.S. troops, despite the lack of any textual reason to so read that power and despite the fact that the early statutes enacted by Congress explicitly addressed soldiers' treatment and detention of civilians and enemy soldiers. See *supra* notes 148 & 149.

A. Defining and Understanding Concurrent Power

The concept of concurrent power in the area of foreign affairs has not been extensively analyzed and is a source of confusion. One reason for the confusion stems from Justice Jackson's well-known *Youngstown* concurrence in which he set forth three broad situations in which a President's power may be challenged: (1) "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . ."; (2) "When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"; and (3) "When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb."²³⁶ The confusion stems from Jackson's grouping the concept of concurrent authority together with areas in which the distribution of power is uncertain, in his middle category as part of a "zone of twilight."²³⁷ This has led to two conceptual difficulties. The first is that scholars and political leaders associate concurrent power with Jackson's second, middle tier, an association that is inaccurate, since Jackson's three tiers refer to the relationship between congressional and Executive action and not the respective powers of the branches.²³⁸ Concurrent powers exist in all three categories. The President may act in conformance with congressional will and still have concurrent power to act stemming from the Constitution and not the statute, although a court will undoubtedly not reach that question once it finds that she has statutory

²³⁶343 U.S. at 637-38.

²³⁷343 U.S. 579, 637 (1952).

²³⁸See MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 15-16 (1990) (Usage of the term concurrent power to refer to Jackson's middle tier, the zone of twilight is inaccurate.).

power to act.²³⁹ So too, the President may have concurrent power over a particular area, but he acts unconstitutionally if in conflict with the implied or express will of Congress.

The second, and more important, confusion has occurred from lawyers and scholars lumping together concepts of concurrent authority and uncertain authority, which are distinct categories and require different analysis. Where the distribution of power is uncertain, courts and commentators must analyze its proper distribution, a complex, often murky analysis that requires either drawing lines separating the branches' respective authority or balancing the branches' function in particular cases to determine where each branch's power begins or ends or which core powers of each branch cannot be impermissibly interfered with upon by the other. In contrast, where one determines that the two branches have concurrent power, that determination means that the distribution of power is not uncertain and the sole question is that of determining congressional will.

The Department of Justice confuses and intermingles the two different concepts of concurrent power and powers of uncertain distribution in its memorandum of Legal Authorities Supporting the Activities of the National Security Agency Described by the President.²⁴⁰ That memorandum claims that the AUMF authorization transforms the struggle against al Qaeda “from what Justice Jackson called ‘a zone of twilight’ in which the President and Congress may have concurrent powers whose ‘distribution is uncertain’”²⁴¹ But Jackson did not refer to concurrent power whose distribution is uncertain, but stated there is a zone of twilight in which the President and Congress “may have concurrent power,” *or* in which the distribution of power

²³⁹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

²⁴⁰ See note ____ *supra*.

²⁴¹ *Id.* at 11.

is uncertain.²⁴² The Justice Department's memorandum suggests that even if Congress has concurrent power to regulate intelligence gathering activities, one still has to determine whether an exercise of congressional power impermissibly interferes with the Executive's authority.

Perhaps the confusion is caused by potentially different meanings of the words "concurrent power." One could define the term loosely to mean simply that Congress and the President have some power within the same area. For example, one could say that Congress and the President have "concurrent war powers," and mean that each branch was given some war powers, Congress to declare war, the President to be Commander in Chief and that the distribution of these powers is uncertain. But that is not what I believe Jackson meant by his admittedly undefined use of the term, and is not the definition I use here. The definition of concurrent used here—that both branches have the power to act upon the same subject—makes it a more useful legal concept than the loose characterization of concurrent as meaning that both branches have power in related, broad areas.

Yet another source of confusion is the intermingling of the terms "independent power," "inherent power," "exclusive power" and "core power," particularly when discussing foreign affairs power.²⁴³ The President's independent Commander in Chief power is often conflated with an exclusive power or inherent, indefeasible power. To say that the President has independent power stemming from the Constitution does not mean he has exclusive authority. Rather it simply means that he has constitutional authority to act in the absence of congressional authorization, either implied or express. That does not tell us whether Congress also has

²⁴²343 U.S. 579, 637 (1952) (emphasis added).

²⁴³343 U.S. 579, 646-47 (1952). Justice Jackson noted that "'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeable and without fixed or ascertainable meanings."

independent power to act in this same area. Only where the President has the exclusive power to act is Congress precluded from acting upon the same subject matter. Where the two branches have concurrent power, it means that they both have independent, but not exclusive power to act upon the subject area. But in a case of conflict the rule would seem clear. Where Congress has the concurrent power to act, the President cannot act in opposition to the law Congress enacts, irrespective of whether he also has the independent authority to act.²⁴⁴ For the President must obey and enforce duly enacted laws, and where the President and Congress have concurrent power to take certain actions, Congress must have primacy in case of conflict. Indeed, that is the express meaning of Justice Jackson's third category in *Youngstown*, when "the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain Presidential control in such a case only by disabling the Congress from acting upon the subject."²⁴⁵ Where Congress is not so disabled it

²⁴⁴Professor Henkin's well-known treatise on Foreign Affairs and the Constitution refers to concurrent powers in a manner that must be different than that set forth here. Professor Henkin writes that

Justice Jackson did not tell us, or offer a principle that might help us determine, which powers are concurrent. Nor does the Jackson "arithmetic" suggest which branch prevails in case of conflict between them. The area of concurrent power seems to involve principally Presidential pretensions where congressional authority is clear, which might suggest that Congress should usually prevail in case of conflict, no matter which branch acted first.

LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 95 (2d ed. 1996). My definition of concurrent power postulates that both branches have legitimate authority over the same area, and therefore under Jackson's formulation in *Youngstown*, Congress should *always* prevail when there is a conflict.

²⁴⁵343 U.S. 579, 536.

must have either the exclusive power to act or concurrent authority to act. Only if Congress has no authority to act can the President prevail.

For example, the Justice Department conflates the notion of independent power and exclusive power in arguing that FISA would be unconstitutional if read to prohibit the NSA's warrantless wiretapping program. The Department of Justice argues forcefully and persistently that the President has *inherent* constitutional authority to conduct warrantless searches as part of his "duty to protect the nation from armed attack," yet most of the precedents it cites stand simply for the proposition that the President has some independent authority to engage in warrantless wiretapping for national security purposes, but not that he has exclusive authority to do so irrespective of legislation forbidding such conduct.²⁴⁶ The only judicial decision the Justice Department cites that does seem to support an exclusive power in the Executive is *In re Sealed Case*, and that decision also clearly muddled and misused the term inherent power.²⁴⁷ In that case, the Foreign Intelligence Surveillance Court of Review argued that the Fourth Circuit's decision in *United States v. Truong Dinh Hung* "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, FSIA could not encroach on the President's constitutional power."²⁴⁸ But the Fourth Circuit in *Truong* simply held that the President had independent constitutional authority to conduct foreign intelligence wiretapping, but explicitly disclaimed that the President had exclusive authority to preclude legislation requiring warrants. The Court stated that the "imposition of a warrant requirement,

²⁴⁶DOJ Memorandum, *supra* note ___, at 9; *see pp.* 7-10 generally.

²⁴⁷*In re Sealed Case*, 310 F.3d 717, 742 (For. Int. Serv. Ct. Rev. 2002); DOJ Memo, p. 8.

²⁴⁸*Id.*

beyond the constitutional minimum . . . should be left to the intricate balancing performed in the course of the legislative process by Congress and the President. The elaborate structure of the statute [the FISA, which had been enacted subsequent to the surveillance involved that case] demonstrates that the political branches need great flexibility to . . . formulate the standards which will govern foreign intelligence.”²⁴⁹ The President has an independent power that does not depend on legislation, does not mean sole power, and as the Fourth Circuit recognized in *Truong*, Congress also has constitutional authority to regulate intelligence gathering in the United States in time of war. As the court recognized in *Hamdan*, whatever “independent power” the President may have does not allow him to “disregard limitation that Congress has, in proper exercise of its own war powers, placed on his powers.”²⁵⁰

The President’s Article II independent power as Commander in Chief to conduct warfare that is authorized by Congress has three relevant components. The first is his or her power to control the conduct of military campaigns in a duly authorized war. In the absence of any directive or limitation from Congress, the President and his subordinates must decide the tactics and strategies used to conduct military campaigns, subject to constitutional or international law limitations.²⁵¹

Second, the President was given, in Hamilton’s words, “a right to command the military and naval forces of the nation.”²⁵² The President or his subordinates must actually give orders to

²⁴⁹United States v. Truong Dinh Hung, 629 F.2d 908, 914 n.4 (4th Cir. 1980).

²⁵⁰126 S. Ct. at 2774 n.23.

²⁵¹For example, the President’s Commander in Chief power to conduct warfare may in certain circumstances be restricted by the Bill of Rights, or by treaties of the United States, and is also limited by international law. See ____-____ *infra*.

²⁵²Hamilton, *supra*; Federalist 69, at 448.

the military during warfare, Congress may decide that the President shall implement certain policies during a war, but it falls to the Executive to give orders carrying out those policies. Congress does not send orders to the front, even general orders directing commanders to seize or treat prisoners in a specified manner. That is an Executive function. The second aspect of the power to command is the President's control over his or her commanders. Congress cannot take command itself, cannot appoint nor remove the general in charge of a particular war or particular command: that task falls to the President, subject to restraints imposed by the Constitution and Congress.²⁵³

Finally, the President has the power as Commander in Chief to repel sudden attacks.²⁵⁴ That power provides the President with the authority in peacetime to respond to attacks upon U.S. troops or U.S. territory.²⁵⁵ That authority has been the subject of much controversy over the last half of the twentieth century, as Presidents and the supporters read the repel attacks powers as a broad mandate to defend U.S. national security wherever in the world it was threatened.²⁵⁶

²⁵³For example, the Appointments Clause of the Constitution provides that the President's appointment of all officers of the army and navy is subject to confirmation by the Senate, unless otherwise provided by law. U.S. CONST. art. II, § 2, cl. 2.

²⁵⁴See pages ____ - ____ *supra* and notes ____ - ____.

²⁵⁵For example, Section 2 of the War Powers Resolution defined the Commander in Chief's power to repel attacks as arising only "by an attack upon the United States, its territories or possessions, or its armed forces." Pub. L. No. 93-148, 87 Stat. 555 (1973), codified at 50 U.S.C. § 1541, 1544(c) (____).

²⁵⁶During the Vietnam War, the Executive branch argued that the President had the unilateral power to send troops to Vietnam because in the modern context warfare anywhere in the world might "impinge directly upon the nation's security." *Office of the Legal Adviser, Dept. of State, the Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085 (1965). For the contrary position that the Constitution only accords the President a narrow power to defend the country from attack see S. REP. NO. 220, 93rd Cong., 1st Sess. 10-14 (1973); Fisher, *supra* at 8-9; JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993).

While the debate over the Commander in Chief's repel sudden attack power has focused on the President's constitutional authority to initiate warfare, the "repel attack" understanding also has implications for the President's ability to conduct wars authorized by Congress. As the debate on the Cooper-Church Amendment in 1970 illustrates, once the President is conducting warfare, he has authority to decide what tactics are to be used to protect troops already in the war zone from enemy attacks.²⁵⁷

These are the independent powers of the President as Commander in Chief to conduct warfare authorized by Congress. Only the second power, the right to command, is an exclusive power.

B. Drawing the Lessons of History

That Congress has broad concurrent power over the conduct of warfare is confirmed by the history recounted in Section II. Congress and the Supreme Court have read the Article I declare war and letter of marque and reprisal clauses to permit Congress to authorize unlimited war or a limited, partial war in which the President's powers as Commander in Chief are restricted by the terms of the authorization. As the preceding section demonstrated, Congress can and has limited the forces President can deploy, permitting only the use of naval forces or only an air war. Therefore, it could also authorize warfare but limit the President to use only tanks, only conventional weapons, or only a certain number of army divisions and no more. Congress has used its war authorization power to define and limit the objects and purposes for which warfare may be waged in ways that substantially restrict the President's tactical flexibility. Congress

²⁵⁷In the debate over including a proviso recognizing the President's power to protect the Armed Forces of the United States, Senator Cooper pointed out that the powers being discarded "are essentially defensive to repel attack, sudden and impending" Remarks of Senator Cooper on the Second Byrd Amendment reprinted in EUGENE DVORIN, *THE SENATOR WAR POWERS: DEBATE ON CAMBODIA FROM THE CONGRESSIONAL RECORD* 186 (1970).

limited its first authorization to use force against France in 1798 to taking reprisals against French ships that had attacked our ships; it limited the 1991 Gulf War authorization to kicking Iraq out of Kuwait and not removing the Iraqi regime; it limited the objects and purposes of the use of force in both Lebanon and Somalia to substantially restrict the tactics and forces the President could deploy.

Congress has also restricted the time period and duration of its authorization of force, generally in the War Powers Resolution and more particularly in its authorization of the Somalia and Lebanon troop deployments. In those latter authorizations it has in essence promulgated rules of deployment, severely restricting how the President could use the force deployed.

Congress has normally imposed these restrictions in its initial authorization, but there is no logical, textual nor historical reason to limit congressional power to the onset of warfare. Congress can, of course, withdraw its authorization, totally, and enact another authorization which provided the President with more limited authority to conduct warfare. Congress could also simply amend the original authorization by providing an express limitation on the President's authority to conduct a war, which essentially Congress did when it restricted funding for the introduction of ground troops into Laos and Thailand. In short the power to authorize limited war, not full scale warfare, does not terminate at the beginning of hostilities, but is a continuing source of congressional power.

Congress has also relied extensively on its other war powers to limit the Commander in Chief's discretion in prosecuting a war. It has used its power to make rules for the government and regulation of land and naval forces, to enact articles of war governing the permissible conduct of soldiers during wartime and peacetime. It has employed its power to make rules concerning captures on land and water to determine which enemy or merchant ships the military

can capture in wartime and which it cannot, which enemy property shall be seized and confiscated and which shall not, and how prisoners of war will be detained and treated. Congress has relied on its power to define and punish offenses against the law of nations to provide that certain military tactics shall be impermissible war crimes, such as the bombing of undefended towns. Congress has invoked its power to grant letters of marque and reprisal, not only to initiate hostilities short of declared war, but also to authorize the President to employ privateers for limitation purposes and with limited instructions against the enemy. It has relied on its power to raise and support armies and to provide and maintain a navy to issue detailed instructions to the President as to which and how many soldiers and sailors will serve on naval vessels and to impose restrictions on how the President may use the army in conducting warfare. And Congress has the power under the necessary and proper clause to enact any law that is useful or convenient to execute any of its specifically mentioned powers under the broad reading of that clause set forth by the Supreme Court.²⁵⁸

The history also illustrates that Congress has not interfered with the President's conduct of warfare in several areas. First, the Congress has not attempted to direct troop movements in battle, to provide battle plans, to order troops to attack or retreat, to require an attack at the particular location. While Congress has instructed the President as to the geographic scope of his authority to attack the enemy, and how many overall troops he may use, it has not told him particularly where he must attack, or how many troops he must use in such an attack.

Congress has not done so because it has recognized that it be impractical and unwise to micromanage the army's battlefield movements and plans in that respect, not because of a lack of constitutional power. Congress certainly would never be capable of meeting and deciding when

²⁵⁸McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

the army should retreat or advance, and the need for secrecy, unity of command, and flexibility in war generally preclude congressional legislation in this area. But there is no sound theoretical distinction between the powers Congress has exercised and the direction of and planning for battles, with the exception that Congress cannot command the army and give it orders. Congress could theoretically authorize the use of force against another nation yet restrict that authorization to launching an attack against a particular town. Congress could have used its funding power to restrict the use of authorized funds during World War II against any beachhead in France except those in Northern France. Or it could use its funding power to limit the number of divisions for which funds could be used to implement the attack. None of these restrictions would be fundamentally or theoretically different from what Congress has done. While it would be foolhardy and impractical for Congress to enact any of these types of restrictions, the Civil War congressional Republicans were correct when they argued that the fact that it would be impractical and idiotic for Congress to exercise such powers does not mean that it would be unconstitutional for it to do so. Congress has many unchallenged powers to enact foolish or unwise measures.

One could argue, however, that the potential danger that Congress could enact impractical, and unduly restrictive legislation controlling the movement of troops in battle supports a constitutional rule according the President sole power in this area, even if the line that was drawn was somewhat vague or somewhat theoretically indefensible.

That argument fails for two reasons. First, such a line is unnecessary. Congress has never interfered with battle plans or troop movements in the course of battle, even during the Civil War when congressional intermeddling in military matters was at its height. Congress is not even remotely likely to do so in the future, nor in most cases is it even capable of doing so. The

line drawing would not be in response to a real problem, but a speculative, highly remote hypothetical. Important constitutional distinctions ought not be based on imaginary problems.

Worse still, the purely speculative danger that Congress might in the future interfere with battle plans or troops movements in the course of warfare, must be balanced against the very real and present danger that Presidents will use the invocation of sole power over troop movements to expand their power dramatically at Congress's expense. Modern Presidents have done just that. They have sought to expand their narrow constitutional power to repel sudden attacks into a power to introduce U.S. troops into hostilities anywhere in the world United States national interests are threatened. They have argued that the President's narrow power to protect our troops precludes Congress from limiting offensive actions that significantly expand a war. The current administration has argued that the President's power to direct the movement of troops precludes Congress from absolutely forbidding torture, or warrantless spying against Americans. The potential for abuse of a narrow but theoretically expandable rule is both enormous and ever-present.

Congress has also generally not restricted the President's power to repel attacks on American troops.²⁵⁹ But the President's power to repel attacks should be viewed as an independent power that permits the Executive to act with speed and flexibility in the absence of congressional authority, but that Congress has the right to regulate and limit that power.

²⁵⁹See Cooper-Church Amendment, Lebanon authorization; Somalia authorization, *supra* at pages ____ - ____, and the Emergency Supplement Appropriations for the Fiscal Year ending September 30, 2007 providing funds for the wars in Iraq and Afghanistan, 110 H.R. 1591, § 1904(F) permitting the Secretary of Defense to deploy United States armed forces after the 180 day period of redeployment from Iraq for, *inter alia*, protecting American diplomatic facilities and American citizens, including members of the Armed Forces.

The President's power is only the emergency power to *repel* an attack and is therefore by necessity a temporary one to be exercised until Congress meets to decide what to do.²⁶⁰ Indeed, the War Powers Resolution limited the President's emergency power to use troops to repel an attack to 60 days unless Congress is physically unable to meet or the President certifies that unavoidable military necessity respecting the safety of United States Armed Forces requires an extension for no more than 30 days.²⁶¹ Thus Congress has limited the time during which the President could utilize such "repel attack" authority and could also impose advance temporal limitations in specific situations. So too, Congress could also use its funding power and rules and regulation power to restrict the manner in which the President could respond. For example, legislation that provided that the President should not use nuclear weapons to respond to a Soviet attack on American forces in Europe during the Cold War would be within the clear power of Congress to make rules for the army despite its limitation on the President's power to repel attacks. Similarly a hypothetical proviso that no funds provided to the Department of Defense could be used to attack China during the Korean War would be constitutional under Congress's spending power and its declare war power even though it would have limited the President's authority to respond to a Chinese surprise attack on General MacArthur's forces engaged in combat in Korea. Congress might have felt that the dangers of wider war in Asia were so enormous that the safer course would be to limit our response to a Chinese attack on United States forces. Indeed Congress has limited the permissible tactics that the President may use to

²⁶⁰In this way, the President's power is similar in structure and intent to the power reserved to individual nations under the U.N. Charter to exercise their right of self-defense "until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter, art. 51.

²⁶¹War Powers Resolution, 50 U.S.C. § ____ (1973).

respond to attacks on American troops by enacting rules and regulations for the military and statutes such as the War Crimes Act. More generally, as Senator Javits, an important sponsor of the War Powers Resolution noted in the Senate debate on the Cooper-Church Amendment, the decision as to how to respond to attacks and protect American troops often requires a balancing of the lives of the soldiers on the front lines with the potential loss of many lives in an escalation of war—a determination that Javits felt was for Congress to make.

Finally, as already discussed, Congress has not and could not constitutionally claim a right to appoint itself or someone else besides the President to command the armed forces and give it orders. While Congress has restricted who the President can appoint and has imposed rules as to the chain of command,²⁶² the sole means for Congress to remove the President as First General and Admiral of the Armed Forces is impeachment.

C. Concurrent Power Over Warfare: A Sequential, Not Horizontal View of Separation of Powers

The President's power as Commander in Chief to conduct war is best understood as a concurrent power shared with Congress but subordinate to congressional authority. The Commander in Chief's power to direct United States military forces in wartime is shared with Congress's panoply of war powers and both institutions can take actions in the same subject area. As Congressman Otis and others argued in the 1790s, and Senator Trumbull and his Republican colleagues argued in 1862, the President could exercise his Commander in Chief power in the absence of congressional direction. Similarly, Justice Marshall suggested in *Little v. Barreme* that the President might have independent power to seize ships traveling from enemy ports in

²⁶²While the history of these restrictions is beyond the scope of this article, see generally WORMUTH & FIRMAGE, *supra* note 72, at 87-104; Hartzman, *supra* note 62, O.L.C. Op. 182 (1996).

wartime, but Congress could limit that power. Or as Justice Story argued in dissent in *Brown v. United States*, where there is “no act of the legislature defining the powers, objects or mode of warfare,” the President has the power to act according to the law of nations. “If such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the Executive must have all the rights of modern warfare vested in him.”²⁶³

The President has independent power stemming from his Article II Commander in Chief power to take actions he or she believes necessary in conducting hostilities authorized by Congress, so long as those actions are not inconsistent with constitutional restrictions and international law.²⁶⁴ The nature of warfare, which requires speed, secrecy, flexibility and unity of action, dictates that the President have the power to act independently of Congress and not be required to await instructions or laws enacted by an unwieldy legislative body. Nonetheless, the functional need to provide a check on the Commander in Chief’s wartime power requires that the President’s power be independent but not exclusive or primary. Congress, if it so chooses, can exercise its concurrent power to preclude or override Presidential action to the contrary.

The grant of concurrent war powers to Congress and the President is not unusual. Although the Constitution explicitly grants Congress the power to establish rules and regulations for the army, it does not exclude the President from also exercising independent power to

²⁶³ 12 U.S. (8 Cranch) 110, ____ (1814).

²⁶⁴ The President’s independent constitutional power stems from the laws of war and must be exercised consistently and not in derogation of the laws of war. Lobel, *supra* note ____, at ____; JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 169-73, 487-90, 492-95, 856-61 (2d ed. 2003); Koh, *supra* note 6, at 648-49; *but see* John Yoo, _____ (for contrary view). In addition, the Bill of Rights precludes the President from taking certain actions, nor does he have broad Commander in Chief power to take certain actions in the domestic sphere. See *Youngstown*.

establish rules for the military, and Presidents have exercised such independent authority repeatedly.²⁶⁵ As the Supreme Court said in *Loving v. United States*,²⁶⁶ Congress “exercises a power of precedence over, not exclusion of Executive authority.” The *Loving* Court noted that congressional plenary power to establish rules for the army co-exists with the President’s independent duty as Commander in Chief “to take responsible and continuing action to superintend the military, including the courts-martial.”²⁶⁷ Both Congress and the President thus have jurisdiction over the same subject matter.²⁶⁸ That the President has independent power stemming from his Commander in Chief power means that he can act independently of congressional authorization, not in disregard of it.

Constitutional power to conduct warfare, according to this view of concurrent authority, is not divided between the branches based on a line between certain subjects amenable to congressional regulation and other subjects in the exclusive province of the President. Rather, the practical division of power is sequential, not horizontal. This distribution of power is based on the practical reality of according the President initiative and flexibility to act quickly in the face of what often is a rapidly changing political and military reality which the President is best

²⁶⁵WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 27 (2d ed. 1920) (President’s function as Commander in Chief authorizes him to issue . . . such orders and directions as are necessary and proper to ensure order and discipline in the army.”).

²⁶⁶517 U.S. 748, 767 (1996), citing *United States v. Elliasion*, 16 Pet. 291, 301 (1842).

²⁶⁷*Id.* at 772. In *Swain v. United States*, the Supreme Court held that the President had independent Commander in Chief power to convene a court martial without statutory authority. The Court approvingly quoted a Senate report that the President possessed this power “in the absence of legislation expressly prohibitive.” 165 U.S. 553, 557-58 (1897).

²⁶⁸*See* G. NORMAN LIEBER, *REMARKS ON ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL* 16 (1898) (Lieber also points out there is no clear line separating the President’s constitutional authority in this area from that of Congress.).

equipped to respond to, yet also accord Congress the power to check and limit Presidential initiative before and after the Executive acts. The President has the power to initiate, while Congress has a more deliberative reactive power as well as the power to condition and limit Presidential power before engaging in hostilities.²⁶⁹

Alexander Hamilton and James Madison discussed this notion of concurrent power in their famous Helvidius and Pacificus debated.²⁷⁰ Hamilton wrote that although only Congress could decide whether the country could go to war, “the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions. From the division of the Executive power there results, in reference to it, a *concurrent* authority, in the distributed cases.”²⁷¹

Madison did not disagree with Hamilton. The Executive could not impose “a *constitutional obligation* on the legislative decision,” but could create an antecedent state of things that would have “an influence on the expediency of this or that decision in the opinions of the legislature.”²⁷² To Madison, “[I]n this sense the power to establish an antecedent state of things is not contested.”²⁷³ For both Madison and Hamilton, concurrent authority gave the

²⁶⁹Michael J. Glennon, *The Constitution Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533, 561 (1991). Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. 311 (1979) (testimony of Professor Abram Chayes).

²⁷⁰Alexander Hamilton, Pacificus No. 1, in 15 The Papers of Alexander Hamilton (H. Syrett & J. Cooke eds., 1969); James Madison, Helvidius No. 3, in 15 The Papers of James Madison 102-03 (T. Mason et al. eds.).

²⁷¹Pacificus No. 1, *supra* note 270, at 42 (emphasis in original).

²⁷²Helvidius No. 3, *supra* note 270, at 102-03 (emphasis in original).

²⁷³*Id.* at 102.

President authority to act before the legislature did, but could not control or have primacy over legislative action.²⁷⁴

Ironically, the chief expositors of concurrent powers as sequential in the war powers area thus far have been proponents of Executive power. Adherents of strong Presidential power have argued that the President and Congress have concurrent power to initiate hostilities.²⁷⁵ For example, according to these advocates the President may act pursuant to his authority as Commander in Chief to seize the initiative to wage war, subject to congressional control over funding.²⁷⁶ While these advocates of Executive power understand the concept of concurrent power set forth here, they have misapplied it to the area of the initiation of warfare. For the Constitution design is clear that the President was not to have any power to initiate hostilities but only had the limited power to reply to surprise attacks. Unlike the elaborate war powers Congress is given to control the conduct of war, the framers made clear that Congress, and *not* the President, was the branch with the sole authority to initiate hostilities.

Conclusion

The framers of the Constitution intended that Congress have substantial power to control the conduct of warfare it has authorized. The consistent history of congressional restrictions confirms that the Constitution grants Congress concurrent power to decide not only whether to initiate warfare, but how and in what manner those authorized wars should be fought. Read this way, the Constitution sensibly accords the President considerable flexibility and discretion to

²⁷⁴For an interesting and illuminating discussion of this debate, see Casto, *supra* note ___, at 631-32.

²⁷⁵Yoo, *War and the Constitutional Text*, *supra* note 102, at 1683.

²⁷⁶Justice Department memorandum for Motion to Dismiss in *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

conduct warfare, but permits Congress to maintain the ultimate authority to decide whether the President's policies and strategies are those the nation should follow.

